

IN THE
Supreme Court of the United States,

ON CERTIFICATE AND CERTIORARI FROM THE
SECOND CIRCUIT.

THE NORTH AMERICAN COMMERCIAL
COMPANY,

Plaintiffs in Error,

vs.

THE UNITED STATES.

Brief for the Appellant.*

This case comes up on a certificate from, and writ of certiorari to, the United States Circuit Court of Appeals for the Second Circuit.

The action was brought by the United States upon what is called a *lease* of the right to take seals upon the Pribylof Islands, executed March 12th, 1890, by the Secretary of the Treasury, under the provisions of the laws relative to the fur seals in the territory of Alaska, to the defendant company, for rent to the amount of \$132,187.50, alleged to be due under the lease for the year ending April 1st, 1894.

These provisions of law were, at the time of the execution of the lease, contained in the Revised

Statutes; but they were taken almost bodily from an act of Congress, passed July 1st, 1870, entitled, "An Act to prevent the extermination of Fur Bearing Animals in Alaska." That act, along with provisions designed to protect the seals, contained others requiring the Secretary of the Treasury to lease the right of taking them for their skins, and prescribing the method, terms and conditions of the leasing. A lease had been made under these provisions to another company, the predecessor of the defendant, dated May 1st, 1870, for twenty years, and the lease to the defendant company was made to take effect upon the expiration of that term.

The provisions, in substance and effect, of the law of 1870, leaving out of view the details, were five:

First.—To make the killing of seals unlawful, except during certain months.

Second.—To protect the seals by prohibiting any killing of *females* by any persons, under any circumstances, or of any *male* seal less than one year old, or of any seal, except by permission of the government.

Third.—To *limit the number* of seals which might be taken without violating the foregoing prohibitions to 100,000; 75,000 on the Island of St. Paul, and 25,000 on St. George; thus establishing a *maximum* number of *male* seals which might be made the subject of capture for their skins.

Fourth.—To let out, every twenty years, the sole right to take this *maximum number* to the highest bidders for successive terms of twenty years, a minimum rental being prescribed of \$50,000 per annum, the rivalry consisting in the bidding of sums in excess of that.

Fifth.—Inasmuch as the successful bidder might, unless further restrictions were provided, take 100,000, and this might prove to be too large a draft upon the herd, it was further provided that the Secretary of the Treasury might, in his discretion, “restrict and “limit the right of killing, if it should become necessary for the preservation of such seals.” But this discretion could be exercised only “with such proportionate reduction of the rents as shall be right and “proper.”

It will be perceived that these provisions regarded the herd of seals on the Pribylof Islands as a proper subject of husbandry, just as much as a sheep or cattle ranch, the husbandry being founded on the well-ascertained truth that, whereas the number of births is equally divided between males and females, yet for purposes of reproduction one male may suffice for twenty or even fifty females. The scheme of nature is, itself, suited to this policy; for, in the case of seals, the older and stronger males will not permit the younger ones to come upon the breeding grounds, where the females are gathered together in harems of ten to forty or more under the vigilant supervision of their respective bulls. A large number of young males may, therefore, be taken annually without diminishing the size of the herd, for, unless taken by man, a similar number would perish in the deadly struggle for supremacy, and in other ways.

This policy was the fruit of very long experience under the Russian administration, and is the one adopted wherever the fur seal has been preserved by the care of man.

Under the first lease, therefore, according to the statute of 1870, the rights of the lessees and of the United States respectively were extremely simple and

clear. The "right," which was the thing which the Secretary of the Treasury was directed to lease, was the right to take the annual product of the herd, not exceeding 100,000, subject to such further limitations as to number as the secretary should from time to time make, whenever in his judgment it should become necessary "for the preservation of such seals," a proportionate reduction in the rental being made whenever this discretion should be exercised.

It should be observed that the restriction of the killing to 100,000 was, in terms, limited to twenty years from the passage of the act. This was obviously for the reason that the making of a twenty-year lease was the dominating motive of the whole act, and this limitation was for the very purpose of defining "the right" intended to be leased, and to supply the *maximum number* upon which the discretion of the secretary to *reduce* was to operate. He could not, of course, *further limit* the right to take with a *proportionate reduction* of rental, unless a *maximum* were established from which the amount of the reduction could be computed.

It was further provided in the Act of 1870 (Sec. 4) that "At the expiration of said term of twenty years, or on surrender or forfeiture of any lease, *other leases may be made in manner as aforesaid*, for other terms of twenty years." And, although the prior limitation to 100,000 annually would, by its terms, expire at the end of twenty years from the passage of the act, it was effectually retained by a clause of the 5th Section as follows:

"And if any person or company, under *any lease herein authorized*, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island *in this act prescribed*, such person or company shall in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of seals killed, &c."

When the Act of 1870 came to be dealt with in 1874 by the revisors all its provisions were re-enacted, with very slight changes in language, including the provision last above mentioned; and the conclusion cannot, as the plaintiffs in error contend, be avoided, that the same system of leasing was thereby continued in all respects.

Under the first lease, the maximum number, 100,000, had uniformly been taken, except in a single year, when the lessees, in consequence of the condition of the market, chose not to take that number.

When the right was again put up every one, of course, supposed that the maximum was the same, and subject to the same discretion in the secretary. Indeed, he assumed to exercise that discretion by the announcement at the time of bidding that the number to be taken the first year would be *limited* to 60,000. The amount bid by the defendant company as rental was a fixed sum of \$60,000, and the further sum of \$7.62½ for each seal taken, and this was the rental incorporated into the lease.

During the first three years of the lease the defendant company was limited to a very small catch, the first year in consequence of the poor condition of the herd, and the two succeeding years not by the exercise of the discretion of the secretary, but by the absolute order of the government in fulfilling its obligation, under what was called the *modus vivendi*, to stop the killing of seals on the islands in consideration of the stoppage by Great Britain of pelagic sealing.

Settlements were effected between the lessees and the Treasury Department by making corresponding deductions of rent on the assumption that the maximum *quota* of 100,000 was in force under the present lease.

For the year ending April, 1894, the company actually received only 7,500 skins. Whether it really *took* these under the lease is a question; but the Treasury

Department (under a new administration) insisted, not only that it took them under the lease, but that the revision of the act of 1870 had, in effect, abrogated the statutory maximum, 100,000, and, with it the provision for a proportionate reduction of the rental, and consequently, that the company was obliged to pay the *whole amount of the rental without reduction*; and that the settlements for the prior years were invalid. The company insisted that by the provisions of its lease, just as in the case of that to its predecessor, there was a maximum limit prescribed of 100,000, and that, therefore, if the take had been reduced in accordance with the law, the rental should be correspondingly reduced, and would have been content to make a settlement based upon this view, which would have required it to pay the sum of \$23,789.50. But it also insisted that the reduction was a violent one, in breach of the contract, and a just foundation for a large claim for damages, which claim it had in due form presented. The parties being thus in difference, this action was brought.

The defence set up in the answer and at the trial was three fold :

First.—That the government having violently, and without any exercise of the discretion of the secretary, prohibited its lessees from taking any seals, had itself failed to perform its part of the contract for the year 1893-1884 and could not maintain an action upon it for the rent of that year.

Second.—If it should be considered that the defendant company in receiving the 7,500 seals had accepted the benefit of a partial performance so as to allow a suit by the government, the claim of the government could yet not be treated in a more favorable way than if it had rightfully limited the catch to 7,500 seals, and therefore that the rental must be correspondingly reduced.

Third.—That the company had, in any view, a just counterclaim for the breach by the government of its contract in not permitting it to take the whole product of the herd up to the maximum number, which counterclaim far exceeded, as it insisted, the claim of the government.

This defence was met by the government by an attempt to set up a new interpretation of the law under which the lease was made. This was that the designation of 100,000 (75,000 on St. Paul and 25,000 on St. George) seals as the normal and maximum number of seals which might be taken under leases was for the period of *twenty years only*, and was, therefore, applicable only to the *first* lease; that with the expiration of that limitation the provision for a further limitation of the killing by an exercise of the discretion of the secretary in case the preservation of the seals required it, accompanied by a proportionate reduction of rental, also failed, and the secretary was consequently left with unlimited authority to make any lease which he deemed best for the interest of the United States, and could limit at any time, in his absolute discretion, the number of seals to be taken; and that, however small this number, the lessees were bound to pay the whole rental stipulated for in the lease; and that the defendant company having actually received 7,500 skins in the years 1893-4, were bound to pay the whole rental therefor; that if this result did not flow from a true interpretation of the act of 1870, as incorporated into the Revised Statutes, it did flow from the provisions of an amending act passed in 1874, which, although passed before the revision was adopted, did yet, because passed after December 1st, 1873, as of which date the revision was to take effect, amend the act as revised. This law of 1874 simply *authorized* the secretary to designate the number of seals to be killed on the islands of St. Paul and St.

George. There can hardly be a doubt that it was simply designed to enable the secretary to make a new apportionment of the aggregate of 100,000 between St. Paul and St. George, and to make a corresponding alteration in the first lease, which was then in force, for the reason that it had been found that while more than 75,000 might safely be taken from St. Paul, 25,000 was too large a number from St. George. It was a change equally desired by the department and the then lessees, as is evidenced by the fact that the change in the lease was made immediately on the passage of the act. Until the present controversy no one had ever thought of imputing any other effect to it.

The government further contended that even if the rental were subject to reduction, the gross sum of \$60,000 only should be deemed *rental* for such purpose, and the \$7.62½ per each seal be viewed as a *bonus* and not subject to reduction.

It contended also in relation to the counterclaim that there was no foundation for that, for the reason that by the contract the lessees were entitled to take only such number as the secretary chose to allow them, and that the 7,500 should be deemed to be the number so allowed, which number they had received. It also contended that the proofs were not sufficient to establish the counterclaim, and that if they were it was a claim in the nature of set-off, and had not been so presented to the accounting officers as to be allowable as a set-off under the statute.

The case was tried in the Circuit Court without a jury under sections 649 and 700 of the Revised Statutes, and findings of fact and conclusions were duly made and filed. The learned Judge, at the trial, as appears by his opinion and findings, took, upon the point of the interpretation of the lease, substantially the view of the government that the designation of the maximum of 100,000 was only for

twenty years, and that by the *Revised Statutes* this designation was abrogated for future leases, and, if the Revised Statutes did not have this effect, the amending act of 1874 did; and, consequently, when the new lease was made it was left to the secretary to determine what number should be taken; and that the provision for a reduction of the number with a corresponding reduction of rents became inoperative. Nevertheless, he was of the opinion that, in case the secretary made no designation of the number, the old designation would stand, and that the lessees would have the right to take the whole annual product, whatever that might be established to be, not exceeding 100,000.

He further held that the prohibition under the *modus vivendi* was not a designation by the secretary, but a violent prohibition by the government; and, consequently, that if the lessees had not received any skins the action could not have been maintained. But he held that, although the seals actually taken were not really *taken* by the lessees, they were received under the contract, and the lessees must accordingly make equitable compensation for them; and that a proper way to determine this was to ascertain what the fair product of the year which might safely be taken was, and compute what each skin would have cost them, assuming they had taken that number, and by this mode of computation, finding that 20,000 might properly have been taken, he reached the sum of \$94,687.50 as the amount due to the government.

He held in respect to the counterclaim that the government had clearly broken its contract by its violent prohibition, and that the lessees were entitled to damages, and, upon the finding that the number of 20,000 might have been taken and the proved value of the skins, he computed the damages at \$142,087.50.

He found, however, that the claim for damages had not been presented to the proper accounting officers as required by law, and, therefore, that the defendant could not use these damages to reduce the amount of the claim of the government.

The effect of this decision, so far as the *counter claim* is concerned, would not be felt hereafter, inasmuch as the *modus vivendi* is no longer in operation, but, upon the question of the interpretation of the lease it would be most oppressive upon the lessees inasmuch as it would be felt in every year during the continuance of the lease. The bids were made upon the assumption of a maximum catch of 100,000, with a proportionate reduction of rental in case of an exercise of the discretion of the secretary to limit it below that number. The sad fate of the seals has made it certain that during the whole of the sixteen remaining years of the lease, but a small fraction of the 100,000 will be allowed to be taken. The expense of taking 10,000 is substantially the same as that of taking 100,000, and for each seal the lessees must pay the government the same fixed price, whatever number is taken, and a larger proportion, for each seal, of the gross rental of \$60,000, as the number is smaller. If the decline in the value of skins goes on as it has begun, it will be impossible for the lessees to escape a heavy loss each year. If limited to 10,000, as may soon be the case, each seal would cost \$6 for gross rental plus \$7.62½, plus \$2 for tax, plus 50c. for pay to natives, making \$16.12½, besides a large additional sum not less, probably, than \$6 for the share of each seal in the large expenditure necessary to furnish a steamer, market the seals, pay freight, insurance and commissions, and satisfy the other obligations assumed by the lessees in the lease.

Meanwhile the government runs no risk and would receive for a catch of 10,000 \$156,250.

After the decision by the Circuit Court the case was

taken by writ of error to the United States Circuit Court of Appeals. The formal assignment of errors will be found at page 172 of the record.

The case was argued before the Court last mentioned, but, before any decision, that Court, under the act of March 3d, 1891, certified to this Court a certain question which appears at page 189 of the record.

Thereupon this Court issued to the Court below a writ of *certiorari*, in pursuance of which the whole record and proceedings were sent to this Court.

SPECIFICATION OF THE ERRORS RELIED UPON.

First.—On error in the interpretation of the lease adopted by the learned Judge at the trial, to the effect that, under the Revised Statutes, the provisions of the act of 1870, fixing a maximum number of seals which might be taken, with a discretionary power in the Secretary of the Treasury to reduce it in case of necessity for the preservation of the seals, and providing for a reduction of the rental in case of an exercise of such discretionary power, were not applicable to leases made after the lapse of twenty years from the passage of the act of 1870.

Second.—On error in the decision of the Circuit Judge that the act of March 24th, 1874, substituted, in respect to future leases, in place of the pre-existing law fixing a maximum take, subject to further restriction by the Secretary of the Treasury, and requiring a proportionate reduction of rental in case of the exercise of such power of further restriction, a full discretionary authority in the secretary to determine the number of seals to be taken, without giving, in any case, to the lessees, any right to a reduction of rental.

Third.—On error in the refusal or failure of the Circuit Judge to decide that the right acquired by the

lessees under the lease was the right to the annual product of the seal herd on the islands of St. George and St. Paul not exceeding 100,000, and subject to the laws of the United States relative to the taking of seals from the said islands, and to the discretion of the Secretary of the Treasury to reduce the maximum number of 100,000, should a reduction be necessary for the preservation of the seals, and with a right to a proportionate reduction of the rent to be paid in case of such reduction of the maximum number.

Fourth.—On error in the decision of the Circuit Judge that the action could be maintained notwithstanding the breach by the United States of its obligation to permit the lessees to take from said islands the annual product of the seal herds thereon.

Fifth.—On error in the decision of said Circuit Judge that the United States had made a partial performance of its part of the contract contained in the lease, and that such partial performance had been accepted by the lessees.

Sixth.—On error in the decision of said Circuit Judge that the defendants, the lessees, had not presented to the proper accounting officers, pursuant to law, their claims for damages for the breach by the United States of its obligation mentioned in the fourth above specification.

Seventh.—On error in the decision by said Circuit Judge that the said claim of the defendants for damages could not be asserted by way of defence, in whole or in part, to the action, without presentation to the accounting officers as aforesaid.

First Point.—It is important in the interpretation of the lease upon which the action was brought to ascertain what the *thing leased* really was. It purports to be, not a mere license to hunt or fish, but the transfer for a term of years of a valuable *right* possessed by the United States in the nature of *property*, and we should first inquire what this valuable right was.

It will be found to be *the right to take the annual product* of the seal herd on the Pribylof Islands, which annual product was the fruit of the industry, labor, expense and care bestowed by the United States upon that herd, and which could be gathered only on those islands.

1. The peculiar nature and habits of the animal, differing widely from that of ordinary wild animals, made a system of *husbandry* possible, by which a large annual draft might be made without diminishing the normal numbers of the herd. The following are some of the particulars in the nature and habits of the animal which gave it this capability.

- a.* Its invariable place of resort for six months of the year, obedient to the imperious instinct of reproduction, was these islands.
- b.* The herd produces annually a presumably equal number of males and females; but, the animal being highly polygamous in its nature, the breeding part of the herd divides itself into harems, absolutely exclusive and separate from each other, consisting of from fifteen to fifty females to one male. There is, consequently, a need, in order to maintain the numbers of the herd, of but a com-

paratively small number of all the males produced. Only those males maintained a place on the breeding grounds who were able to do it by their age, strength and prowess, and few attempted this under the age of five years. All the males under this age, hauled up upon places separate and apart from the breeding grounds. The skins best fitted for the purposes of commerce were those of males from two to four years of age. These could easily be separated from those less valuable as being too young or too old, and killed, away from the breeding grounds, in such a manner as not to disturb the process of breeding. This superfluity is the *annual product* of the herd which may be taken without injury to the stock. The superfluity of males thus taken would, otherwise, have been destroyed in the deadly battles waged between the males. Nowhere in nature can be found a more perfect provision by which man can obtain the benefit of a bounty of Providence if he will only comply with the conditions upon which it is offered.

- c. The whole herd in hauling upon the islands voluntarily submitted itself to the power of man. Their means of locomotion were extremely imperfect and man could easily kill them all.
- d. We have said that the nature and habits of the animals made them *susceptible of being treated as property*. All that was necessary to make them property was to so *treat* them.
- e. Treating them as property consists in tak-

ing possession of, and caring for, them *as* property; that is to say, guarding and cherishing them so as to enable them to carry on successfully the process of reproduction; never to take any part of the *breeding stock*, but to take all the superfluous *annual product* so far as the commercial demand called for it.

f. To this end the care, industry and self-restraint of the United States, the owners of the land, were requisite, and in the following particulars:

- (1.) To establish a marine guard around the islands to keep off intruders.
- (2.) To reserve from all other purposes all parts of the islands upon which the seals were accustomed to haul up and devote these parts to the natural desires and instincts of the seals, thus inviting them to peacefully land.
- (3.) To exercise self-restraint, and not kill any breeding animals at any time.
- (4.) To maintain a system of watchfulness on the islands, and allow no intrusion upon the process of breeding either by alarming noise, dogs or other intruders.
- (5.) To separate the annual product of the young males and kill them in such a manner as not to disturb breeding operations.

g. All these things the Russians had done for

half a century prior to the acquisition by the United States, and the United States, by the passage of the act of 1870, determined to do, and ever afterwards have done, the same things.

- h. Any other treatment of this animal would amount to simple destruction, and would be an unjustifiable destruction of one of the bounties of Providence intended for the perpetual benefit of man, and, therefore, a crime against natural law.
2. These considerations conclusively establish the above point, namely, that there was an *annual product* of the herd, which might safely be taken, and which ought to be taken, if the demands of commerce called for it, and that this was the property of the United States. They are fully admitted in the opinion of the Court and established by the findings and evidence (Record, pp. 23, 37 to 39).

Second Point.—This right to take this *annual product*, being what the United States possessed, was the right intended by law to be leased by the United States to private individuals, and is, therefore, the right described in Sec. 4 of the Act of 1870, as

“ The right to engage in the business of taking
 “ fur seals on the Islands of St. Paul and St.
 “ George ”; and was the same right as that
 described in Sec. 1963 of the R. S. as “ the

“right of taking fur seals on the islands herein
“named.”

Third Point.—While, however, it is clear that there was an annual product, it would not be safe to leave it to the judgment of a lessee to determine what its amount was. He might take too many, or not properly take, and thus endanger the maintenance of the herd at its normal number; and hence arose the necessity, when the scheme of leasing was adopted in 1870, of defining what the annual product should be. The motive of self-interest in the lessees themselves would undoubtedly be some guaranty that it would not be exceeded. This, however, might not prove sufficient, and certainly would not for the few years immediately preceding the expiration of a lease. Additional security upon this point was, therefore, requisite. This was fully provided by the Act of 1870.

1. It was effected mainly by the provisions of the first two sections. These prohibited the killing of any female seal under any circumstances. No such killing could take place without immediately touching the birth-rate and thus diminishing the stock. They further prohibited the killing of more than 100,000 males in any one year. The Russian experience was supposed to prove that this number could be safely taken. The actual experience of the United States has proved the same, for, during a period of twenty years, 100,000 had been safely taken without affecting the normal numbers of the herd, until after

the effect of the enormous and criminal slaughter of females on the sea began to make itself manifest.

2. This, however, was not a fully sufficient guaranty. The estimate of 100,000 might prove to be erroneous. Disease or other casualties might so affect the herd as to make that number an excessive draft. It was therefore provided that the Secretary of the Treasury might exercise a discretion, in one contingency only, namely, in case it should "become necessary for the preservation of such seals," to further limit the number. Such limitation, however, could not, as it ought not, be made by him, without at the same time making a *proportionate reduction of the rents* reserved in any lease (Act of 1870, Secs. 2 & 3; 16 Stat. at Large, 180).

The annual product, therefore, which might be taken was thus clearly fixed by law at 100,000 males, unless that number were reduced by an exercise of the discretion of the secretary, and then, at the reduced number. No limitation was, in terms, made to *young males*, and none was needed; the breeding bulls could not possibly be taken; their ferocious character prevented interference with them.

3. There is no controversy between the parties respecting the above matters; but it is fully agreed that the lease *first* executed pursuant to the provisions of the Act of 1870, should be interpreted as follows:

- 1st. As giving the right to take the annual product of young males, not exceeding, however, 75,000 on St. Paul and 25,000 on St George.

2d. That this number might be further limited by an exercise of the discretion of the Secretary of the Treasury in one contingency, namely, if it should "become necessary for the preservation of such seals."

3d. That any such limitation must be accompanied "with such proportionate reduction of the rents reserved to the Government as shall be right and proper."

Fourth Point.—The contention of the appellant is that "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul in the Territory of Alaska" demised by the *second* lease, was precisely the same right as that thus limited and defined by law and demised by the first lease. The contention of the Government, on the other hand; at least as originally shaped, conceded that if the Act of 1870 had stood unrevised at the time the second lease was executed, such second lease would have been subject to the same interpretation as the first; but insisted that the revision in 1874 made a *new and entirely different definition* and limitation of the right to take fur seals, namely, that it should be the right to take *so many as, and no more than, the secretary should, by an exercise of his discretion, made at any time, designate*; and that the whole rental reserved in the lease should be payable in all cases, no matter what the designation might be. There is neither in the nature of the case, nor in the language of Congress in any of its legislation, nor in the acts of the parties, any support for this contention of the Government.

1. Upon this contention of the Government the lease would be deprived of its most obvious and conspicuous feature—that of a *contract*, in which something is assured to the lessees. Upon this view the lessees would acquire no legal right to a single seal. The Secretary of the Treasury would have an unlimited and unreviewable discretion to designate whatever number he pleased. Is it reasonable to suppose that Congress would require an annual rental of not less than \$50,000, and the performance of other burdensome and expensive conditions by the lessees, unless it designed to give them the whole annual product of the herd which might safely be taken?

2. In entering upon the interpretation of the provisions of the Revised Statutes it is of importance to know in what precise form the rule should be stated concerning the use which may be made, in construing revisions of laws, of the original acts which are the subject of revision. In fact, no intelligent judge or lawyer ever undertakes to interpret a revision without looking to the original law. Such resort was had in the present case in the Court below, both by the counsel for the Government and by the learned judge.

In the case referred to by the learned judge for a statement of the rule (*U. S. vs. Bowen*, 120 U. S., 508, 513), it is thus laid down by Mr. Justice MILLER. "When the meaning is plain, the Courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."

This rule is abundantly sufficient for the

present purpose. Surely no such interpretation as that for which the Government contends can be said to be clear, plain, or free from doubt on the face of the revision itself.

- a. What the Government claims is that the *nature of the right leased*, was changed in the revision so as to limit it to the number which the secretary should from time to time *designate*. But no *power of designation* is given to him by the revision any more than by the original act.

- b. The contention of the Government is that in respect to *future* leases, after the expiration of the first lease, no *maximum number* was prescribed by the revision. But the revision declares in express terms that a maximum number *is* prescribed. It takes from the original act the same language there used for the same purpose. "If any person "or company *under any lease herein authorized* (and future leases were all that "were authorized by it) knowingly kills or "permits to be killed any number of seals "exceeding the number in for each island "*in this chapter prescribed*" (Sec. 1968). There *was* a provision in the chapter prescribing the limit of 75,000 for St. Paul and 25,000 for St. George (Sec. 1962). It is to no purpose to say that it was prescribed only for twenty years. It was still *prescribed*.

3. But the rules respecting the interpretation of statutory revisions is ordinarily expressed somewhat differently.

There are a multitude of decisions holding

that in such cases there is a presumption that the Legislature did not intend to change, and, therefore, did not change, the original law unless an intention to change it clearly appears.

Taylor vs. DeLancey, 2 Caine's Cases in Error, 143.

Case of John V. N. Yates. 4 Johnson, 316.

Goodell vs. Jackson, 20 Johnson, 693.

In the Matter of Brown, 21 Wendell, 316.

Douglass vs. Howland, 24 Wendell, 35.

Theriat vs. Hart, 2 Hill, 380.

Croswell vs. Crane, 7 Barbour, 191.

Elwood vs. Klock, 13 Barbour, 50.

Dominick vs. Michael, 4 Sandford, 374.

Taggard vs. Roosevelt, 8 Howard Pr., 141.

Jenkins vs. Fahey, 73 N. Y., 355.

The Schooner "L. W. Eaton", 9 Benedict, 289.

The Bark "Brother", 10 Benedict, 400.

Canaan vs. Pound Mfg. Co., 23 Bl., 173.

Blake vs. National Banks, 23 Wall., 307.

Meyers vs. Car Co., 102 U. S., 1.

Endlich on Statutory Interpretation, Sec. 378.

4. If the rule as laid down in these cases is applied, there is an end of the argument at once, and the lease is to be interpreted just as if it had been made under the original Act of 1870.
5. But let us throw away the benefit of all presumptions and treat the question as if it were one to be determined upon an inspection of both

the original act and the revised statutes with no rules to guide us except what common sense, enlightened by legal study, as it is supposed to be with lawyers, suggests. It then becomes this: Did Congress intend to make the change asserted on behalf of the Government? The answer must be in the negative, and from the combined force of many different considerations.

- a. The purpose of revision is not *change*, but *preservation*.
- b. No *occasion* for a change is suggested. What had occurred in the short period of three years which had elapsed, at the time of the revision, since the making of the first lease to suggest the wisdom of a change? 100,000 had been taken each year without the slightest injury to the herd.
- c. By the original act Congress chose to exercise *its* discretion in fixing an absolute maximum limit, leaving the secretary to exercise a subordinate discretion in a single emergency which Congress could not foresee; namely, the case where the maximum catch might endanger the herd. Why should it change all this and commit to the secretary the unlimited discretion to permit 5,000 or 500,000, or none at all, to be taken?
- d. How, with such a change, could any intelligent bidding be had?

e. The change suggested wholly destroys the *right* purported to be leased of its character as a *right*. What right would the lessees have to take a single seal? And yet for this empty and precarious hope the law required the sum of at least \$50,000, in money to be paid, and, besides that, a great number of other things to be furnished and supplied which would cost, probably, twice as much!

The learned Judge felt the force of this consideration, but seemed to think it was met by the suggestion that government contractors often rely upon the good faith and honesty of some designated public officer, and referred to cases where the certificate of a government engineer is accepted as fixing the amount of work done and analogous cases. Undoubtedly, there is a practice in cases of large contracts with public corporations where the prices to be paid for work are all specified, but the quantities are unknown, to make the certificate of the government engineer conclusive as to quantities, in order to avoid litigation. But are there any cases where an officer of a government, or of a municipal body, is permitted to determine not only the quantity, but also the price, and this in his absolute discretion, without measurements or reference to any means of knowledge? Such a case would furnish some analogies to what the government asserts the present contract to be.

f. And why was not the limited discretion reposed in the secretary by the original act wholly sufficient? What object was there in giving him any discretion at all, except to

save the seals from ruinous drafts? And whenever this danger should arise, his discretion was unlimited.

- g. What was the *right* purported to be leased, and how was it created? It was right to take the annual product limited by *law* to 100,000, and subject to a further limitation by the secretary in a clearly specified emergency. This *right* was created by statutory provisions, protecting the seals, and thus securing an annual product and *defining the number* which that annual product should be taken to be. It was the *right thus created* which the Act of 1870 described and leased under the words, "the right to engage in "the business of taking fur seals on the "islands of St. Paul and St. George" (Sec. 4.) Section 5 of the same act provided for subsequent leases as follows: "That "at the expiration of said term of twenty "years, or on surrender or forfeiture of any "lease, other leases may be made in manner as "aforesaid, of other terms of twenty years." Other leases of what? Of the *same right*, of course, as was first leased, the right created by the same statutory provisions. Those provisions created a *thing* which could be leased. That *thing* was the right to take 100,000, subject to the secretary's discretion to reduce in a single emergency.

Now, the similar provision in the Revised Statutes for future leases purports in terms to authorize the future leasing of "the right of taking seals on the islands herein named" (Sec. 1963). What is that right? It must be something. There is absolutely no new provision in the R. S. re-

defining it, no new or additional discretion given to the secretary, but every provision of the old act *which created the right* is substantially re-enacted. How is it possible to prevent the inference that *the* right which is to be the subject of future leases is the *same* right which was the subject of the first?

- g. The argument on behalf of the government asserts that under the Revised Statutes the prescribing of the number to be taken was changed from a limitation by law to an entrusting of it to the perpetual discretion of the secretary; what language is there in the R. S. to justify this? The *powers* of the secretary given by the Revised Statutes are the *same* powers, and no others, and stated in the same language as in the original act. What language is there in the Revised Statutes conferring powers on the secretary which is not found in the original act?

The District Attorney urged in the Court below that Section 1963 of the R. S. under which future leases were provided for and the present one made, "does not contain a word about power to abate rent, or about a maximum quota, or about the annual increase of the herd." Neither does Section 5 of the Act of 1870, which contains the provision in that act for future leases.

- h. And, finally, and as we submit conclusively, the position of the Government violates the fundamental rule of construction that a *meaning must be given to all the language*, whether of a contract, a will or a statute. The

Government treats the *whole* of Sec. 1968 as absolutely without meaning.

6. But there is a short way of meeting this original contention of the government. That whole contention really rests upon the circumstance that the limitation of the killing to 100,000 (75,000 on St. Paul and 25,000 on St. George) was, by the Revised Statutes, limited to the period of twenty years from the 1st of July, 1870. But for this limitation no one would think of asserting any distinction between the right to be demised by the first, and that to be demised by the second lease.

Now that limitation is prescribed as absolutely by the act of 1870, as by the Revised Statutes; and whoever asserts that a second lease executed, with the Revised Statutes in force, would not confer the same right as that bestowed by the first lease, must also assert that a second lease, if executed, of the same character as, the first, under the act of 1870, would not confer that same right: in other words, that Congress in devising *the original scheme*, intended that there should be one particular kind of lease for twenty years, and, thereafter, a totally different one; that under the first lease the right was to be a *definite* one, the proper subject of a contract, and afterwards, and for no perceptible reason, a mere precarious *hope* resting in the discretion of the secretary; that in the one case the amount of rental should bear a proportion to what the lessees were permitted to enjoy, and, in the other case, no proportion whatever; and this in the face of language which declared in substance that the subsequent leases should be of the same character as the first.

This simplifies the discussion, and renders it quite unnecessary to take any notice of rules respecting the interpretation of statutory revisions.

Fifth Point.—By the act of 1870 *one scheme of leasing was established and made applicable alike to the first and every subsequent lease.* Every provision of this act was re-enacted by the Revised Statutes, and no new ones were added. It is equally clear that the two pieces of legislation were intended to be, and in fact are, the same; and the present lease is consequently of the same right, with all its incidents, as that of the first lease.

1. The provision creating the maximum quota of 100,000 and conferring upon the secretary the power to reduce it in a single contingency, and requiring, in such case, a reduction of the rental, was created under the original act by the third section of the act. That *same provision* is re-enacted as Sec. 1962 of the R. S.
2. The original act embraced, as was necessary, authority for the making of the *first* lease; (Sec. 4), and, in giving this authority, it described the character of the lease to be made, namely, by declaring that the secretary should lease “for the rental mentioned in section six
“ of this act (\$50,000), to proper and respon-
“ sible parties, to the best advantage of the
“ United States, having due regard to the
“ interests of the government, the native in-
“ habitants, the parties heretofore engaged in

“ the trade, and the protection of the seal
 “ fisheries for a term of twenty years from the
 “ first day of May, 1870, the right to engage
 “ in the business of taking fur seals on the
 “ islands of St. Paul and St. George, and
 “ to send a vessel or vessels to said islands
 “ for the skins of such seals, at an annual
 “ rental of not less than fifty thousand dol-
 “ lars to be reserved in such lease.” Section
 5 contained the provision for further leases;
 but, as the character of the contemplated leases
 had already been declared in the authority
 given for the first lease, it was necessary
 only to refer to the description, and it
 was as follows: “That at the expiration of
 “ said term of twenty years, or on surrender or
 “ forfeiture of any lease, other leases may be
 “ made *in manner as aforesaid* for other terms
 “ of twenty years,” thus clearly making future
 leases to be of the same character as the first.

When the revision came to be made in 1873
 the first lease had been executed and was run-
 ning. That part of the original act, therefore,
 which made provision for the *first* lease was
functus officio, and was dropped; but, in
 dropping it, the description of the character
 of the intended lease was dropped also. The
 provision, however, for *future* leases was still
 necessary and was retained; but this provision,
 as it stood in the original act, declared that the
 succeeding leases should be “in manner *as*
aforesaid.” This language was no longer
 effective, for there was no longer anything *as*
aforesaid. Consequently, the revisors made the
 provision for succeeding leases the subject of a
 separate section, and, instead of saying that
 they should be “in manner *as aforesaid*,”
 which would have been insensible, they *ex-*
pressly declared what their character should be,

and for this purpose used the *same language* as that employed in the original act to describe the *first* lease. The separate section was as follows:

Sec. 1963. "When the lease heretofore
 "made by the Secretary of the Treasury
 "to 'The Alaska Commercial Company,' of
 "the right to engage in taking fur seals on the
 "islands of Saint Paul and Saint George, pur-
 "suant to the act of July 1, 1870, chapter 189,
 "or when any future similar lease expires, or is
 "surrendered, forfeited, or terminated, the sec-
 "retary shall lease to proper and responsible
 "parties, for the best advantage of the United
 "States, having due regard to the interests of
 "the Government, the native inhabitants, their
 "comfort, maintenance, and education, as well
 "as to the interests of the parties heretofore
 "engaged in trade and the protection of the
 "fisheries, the right of taking fur seals on the
 "islands herein named, and of sending a vessel
 "or vessels to the islands for the skins of such
 "seal, for the term of twenty years, at an
 "annual rental of not less than fifty thousand
 "dollars, to be reserved in such lease."

If under the original act Congress required, as it undoubtedly did, that future leases should be of the same character as the first, by fully describing the character of the first, and then declaring that future leases should be "in manner as aforesaid," referring to the description, most certainly it did the same thing by the revision when it copied and repeated the same description in order to indicate the character of future leases.

3. The contention of the government involves the assertion that by the R. S. the following

momentous changes were effected in the scheme of future leases: (1) That the lessees in place of having a fixed right to the annual product of the herd, not exceeding 100,000, subject only to a discretionary power in the secretary to reduce the number in a single contingency, were to have no fixed right to a single seal; but a mere precarious right to such number as the secretary might designate, and with power in him to change any designation at any time. (2) That for this precarious right the same minimum rental was to be exacted as in case of the former fixed and definite right. (3) That the *whole* rental actually bid and incorporated into the lease was to be exacted, no matter how small a number of seals the secretary might allow to be taken.

And it involves the further assertion that these extraordinary changes were determined upon seventeen years before they could be put into operation, and for no conceivable reason! It would be a moderate requirement to say that before these assertions could be accepted they must be made good by pointing out in the revision language most clearly importing such changes.

There is absolutely no language importing any change whatever. The Revised Statutes reject the interpretation as clearly as the original Act. *

- a. Where is there any language in the revision conferring this new and extraordinary power on the secretary? No word importing such authority can be found. The learned District Attorney, when pressed with this question in the Court below, gave the following apparently formidable exhibition of language

in the R. S. as conferring this power. He said that there was language authorizing the secretary to lease

- (1) "To proper and responsible parties."
- (2) "To the best advantage of the United States."
- (3) "Having due regard to the interests of the government."
- (4) "As well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries."

But this is not *new* language. It is precisely the same as that contained in Sections 4 and 5 of the original act.

- b.* But while the limitation of the number to be taken was, in the first instance, in the original act, confined to the period of twenty years from the passage of the act, it was, as far as future leases were concerned, continued and made applicable to them in explicit language, and the *same* language was re-enacted in the revision, as follows: "And if any person or company, *under any lease herein authorized*, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit," &c. (Sec. 5 of Act of 1870. Sec. 1968 of R. S.)

The only answer which was or can be made to the argument based on the foregoing provision was that after the expiration of twenty years

there would be "*no* number in this act prescribed," and the provision would become inoperative. But this is not correct. The number is none the less *prescribed*, because it is prescribed for the period of twenty years only. The argument for the government makes it necessary that we should *read into*, not only the Revised Statutes, but also the Act of 1870, between the words "shall knowingly," the words "during the period of twenty years mentioned in Sec. 3 of this Act;" or, in the case of the Revised Statutes, "during the period of twenty years from July 1st, 1870."

3. This contention of the government, involving, as it does, the assertion that even under the Act of 1870 the maximum quota of 100,000 would not stand in respect of future leases, encounters a series of objections either one of which would be sufficient to cause its refutation.

a. It assumes that Congress, in establishing for the first time a system of making the herd of Alaska seals most available for the benefit of the country and of commerce, was of the opinion, from the information it then possessed, that it was most expedient for the government and fair to the proposed lessees that *Congress itself* should impose a general limit upon the catch, with a power in the secretary to *reduce* the number if it should prove to be too large for the safety of the herd, and then, without the benefit of experience, *looked forward* to a period twenty years distant, and *predetermined* that experience would then have shown that its conclusion was wholly wrong, and that the best system would be for Congress to *abdicate*

its authority, and commit the whole business of leasing, and the amount of the catch, to the unlimited discretion of the secretary, so as to permit him to change the number at any time, regardless of the just expectations of the lessees when making their bids!

- b. This assumption requires that a totally new and different authority should be bestowed upon the secretary after the lapse of twenty years; and yet the act contains no word creating it.
- c. The interpretation is not only destitute of language in any way supporting it, but it does direct and immediate violence to the language contained in Section 5 of the original act, and repeated in Section 1968 of the revision, and made emphatic there by being the subject of an entire section.
- d. It accomplishes no just purpose, but can operate only to make the provision for bidding an occasion for wild speculation, resulting in disappointment of just expectations, and suspicions of scandalous collusion. Favorites may have the benefit of a hint concerning the action of the secretary, and honest bidders may be surprised by reductions in the permitted catch which they had no reason to anticipate. Indeed, the interpretation takes away from the transaction that character of *contract* which the legislation plainly impresses upon it.
- e. And all this when it is plain enough, upon the mere perusal, either of the original act, or of the revision, that the contemplation was

that future leases were to differ in no respect from the first one.

4. It will naturally be asked what the purpose of Congress was in confining the limitation of the fixed maximum to a period of twenty years. If there were no purpose clearly apparent the circumstance would furnish no ground for the extraordinary construction suggested by the Government. All that this would justify would be an interpretation of the statute according to its precise language; and this requires that we should say that, although the maximum is fixed by Sec. 1962, for the period of twenty years only, yet it is by Sec. 1968 perpetuated until Congress may choose to change it.

5. But this construction is so plainly in accordance with good sense and the nature of the business in hand, that we must suppose it to have been the one intended.

It will be observed (and it makes no difference whether we take the original act, or the revision) that the scheme of leasing was most carefully devised and designed to be *permanent*. *Successive* leases of twenty years were expressly provided for. There was one point only upon which present expectations might be disappointed. This was the *number* of seals which might be taken in each year. Congress had for its guidance the prior experience of Russia. It was true that the taking under Russian administration had never reached 100,000; but it had exceeded 70,000, and under it the herd had grown in numbers so that, from a period when in consequence of disease it had greatly dwindled, it seemed to embrace many millions. It was not unreasonable to suppose that a draft as

large as 100,000 could be taken without detriment. That number could, with the discretion reserved to the secretary, be fixed for the period at least of the *first* lease. When the time arrived for a new bidding the Secretary of the Treasury would naturally call the attention of Congress to the circumstance that the period of its limitation had expired, and that further legislation was in order. If it should then appear either that this number was too large, or that it might be safely made larger, the only amendment which would be needed would be one simply changing the number. But Congress might, for some reason, fail to act, or think no change necessary. In such case there would be difficulty, unless the existing maximum were in some manner preserved. All that was needed to obviate this difficulty was some provision continuing the maximum limit in case Congress *should not act*. This was admirably effected by the introduction of the clause found in Section 5 of the original act, and which was made into the distinct and separate Section 1968 of the revision. If Congress should act and change the limit, this clause would be applicable and effective to enforce the changed maximum. If Congress should not act, the clause would be effective to preserve the existing maximum. This necessary precaution could not have been taken in a better form.

Sixth Point.—The Act of March 24, 1874, changed no feature of the scheme as established by the then existing law.

1. A word or two of criticism upon the action of the Government in setting up this act as effecting a change in the system is justified. Most governments feel themselves bound by the common obligations of decency and good faith in dealing with those who contract with them. It is known nowhere better than in the Treasury Department that this act was passed in consequence of the discovery and communication to that department of the fact that, while the Island of St. Paul could well sustain, in 1874, a draft of more than 75,000, that of St. George was not well capable of a draft of 25,000; in other words, that the *distribution* of the 100,000 between the two islands effected by the Act of 1870, and continued by the revision, was not well contrived. It was equally desired by the then lessees and the department that a *re-distribution*, not changing the maximum of 100,000, should be made, and this act was passed in order to enable it to be done. The re-distribution was made and the lease modified accordingly *the next day* after the passage of the act. Never, until the present claim was made by the Government, has it been suggested that the act was passed for any other purpose, or with any other effect; but the claim is now made that it completely revolutionized the scheme of leasing, changed a definite right to a precarious hope, left no basis upon which intending lessees could intelligently bid, and put it in the power of the secretary to restrict, or stop, the catch at any

time, for any reason, and yet exact the whole of an enormous rental!

The main argument before the trial Court was oral, although printed briefs were afterwards submitted. It seemed to the appellant's counsel, upon that argument, that the purpose of the Act of 1874, as above stated, was practically agreed to by both sides, and that the learned District Attorney did not greatly rely upon this law, but referred to it rather perfunctorily, and as a matter which deserved some consideration. He was, therefore, somewhat surprised at the very important weight allowed to this act in the opinion of the learned Judge. Serious attention must, therefore, now be given to this law.

2. Let us first see in what precise shape the question presents itself. We must recur to the Act of 1870, purported to be amended, and see what the scheme of leasing established by that act was.

As already pointed out, the Act of 1870 viewed the annual product of the herd, as determined by experience, at a number which might be fixed, for the purposes of determining what the minimum annual rental should be at 100,000; but it recognized this number as being, in great measure, conjectural, that it might be excessive, or that accidents, not to be foreseen, might make it excessive. It, therefore, reserved to the secretary, as was proper, a power to further limit the number, not a general or arbitrary power, but one to be exercised only "if it shall become necessary for the preservation of such seals." The lessees necessarily took the hazard of this limited discretion, but it was the only hazard they took, so

far as the number which might be killed was concerned.

The Act of 1870 thus imposed *two distinct limitations* on the number:

First.—An *arbitrary, permanent, general* designation of 75,000 for St. Paul and 25,000 for St. George, 100,000 in all, which could never be exceeded.

Second.—A discretionary authority to the secretary to further *limit* "the killing" whenever the preservation of the seals required it. This last authority, while it may have *permitted*, did not *require*, any new distribution of the reduced catch; but would be properly exercised by limiting the killing, to say, 50,000, leaving the lessees to distribute the amount as they might think fit, subject, of course, to the arbitrary limit fixed by law.

The claim of the government is that the Act of 1874 *abrogated the whole system*. It asks the Court to *read into* the Act, after the word "designate," the words "at any time and from time to time." The defendants insist that the Act shall be interpreted just as it stands, so as to authorize *one new designation*, not exceeding in the aggregate the original limitation of 100,000, of the numbers to be taken on the two islands respectively, which new designation, when made, would replace the then existing permanent designation, and *become* the permanent designation. The precise question, therefore is which of these two meanings did Congress intend?

3. There are several distinct considerations, which, it is submitted, make it immediately and

clearly apparent what Congress intended. (1.) The provision of the Act of 1870, limiting the catch on the respective islands had reference only to the contemplated lease, and was designed only to *create* and to *limit* the rights of lessees under the lease. It applied to none other than *lessees*. It had direct reference, therefore, to *contracts* to be made. (2.) The first lease was then in existence and was to continue for sixteen years more; and therefore, Congress could not, during that period, and for that lease, change the designation *without the consent of the lessees*, and cannot be supposed to have intended any change without that assent. (3.) And, accordingly, Congress, by the Act of 1874, did not assume *itself* to make any change, but only to *authorize* the secretary to make one. It did not *require* him to make it; thus showing that it was not intended that the secretary should act until he procured that assent. (4.) He did *not* act until he had procured it. (5.) But he acted the *very next day* after the passage of the law, which shows clearly enough that the whole matter of the change was *agreed upon* beforehand between the secretary and the lessees. (6.) The change made was to *reduce* the number to be killed on St. George to 10,000, and to increase that on St. Paul to 90,000, leaving the maximum unchanged. (7.) The amended lease refers to the act and purports to have been executed pursuant to it (Record, p. 135).

What can be plainer than that it became known between the department and the lessees, before the act, that the existing designation permitted too many seals to be taken on St. George, but that the excess might be assigned to St. Paul, and that it was desirable that a corresponding

change should be made; that, as the existing designation was established by *law*, it could not be changed without the authority of law, and as it had become incorporated into a contract, it could not be changed without the assent of the contractors. That assent could be had at any moment, and what the act of Congress did, and all it did, was to give the requisite authority to the secretary.

The act, *of itself*, changed nothing; but when the authority given by it was *exercised* the change was effected.

The authority given was not restricted by any regard to the preservation of the seals, but was an absolute and unlimited one. What it purported to be, and what it actually was, was an authority to displace the existing *arbitrary* and *permanent* designation of 25,000 for St. George and 75,000 for St. Paul by a new designation, which, when made, would supersede the former one, and *become the permanent, arbitrary, general, designation*; but be, in the same manner, subject to the exercise of the *continuing discretionary* authority of the secretary to be exercised whenever necessary for the preservation of the seals. It left the discretionary authority still existing, but any exercise of it would, of course, entitle the lessees to a proportionate reduction of the rental.

4. Let us now examine the interpretation of the Government. It is that this amendatory statute, purporting only to authorize the secretary to designate the numbers to be taken on each island, was intended to change, and did change, the *whole scheme of leasing* so carefully devised by Congress; that it abrogated not only the *arbitrary* designation theretofore fixed

by Congress, but also the *discretionary* authority of the secretary to further limit *that*, when necessary for the preservation of the seals; and substituted in place of it an *unlimited arbitrary discretion* in the secretary, from time to time, and whenever he might choose, and for whatever purpose, to designate the number of seals which might be taken by any lessee, so that he might make the designation when any lease should be bid for, or for any year thereafter, and change it, at his pleasure, at any time during the year—fix it at 50,000 at the beginning of a lease, and the next year enlarge it to 100,000 or diminish it to 10,000, and at any time during the year further enlarge or restrict it at his pleasure, so that no bidder could have any real basis upon which to measure his offers, and no lessee could tell what provision or calculations he should make for the year, and that even the violent prohibition under the *modus vivendi* not to take more than 7,500 was a *designation* under this amending act of 1874! It would seem that argument were wholly unnecessary to determine which of these rival interpretations should be accepted; but the argument, if resorted to, will be found conclusive. That of the Government is rejected by every settled rule of statutory construction.

- a. It is a settled rule that every supplementary or amending statute must be so construed as to leave standing everything in the prior law which it does not purport to change; or, as the rule is shortly stated, repeals by *implication* are not favored. It is only when the subsequent statute is repugnant to the pre-existing law so that both cannot stand to-

gether, that the latter will be held to be abrogated or modified.

Endlich on Stat. Int., §§ 132, 210.

Bowen *vs.* Lease, 5 Hill, 221.

Wood *vs.* United States, 16 Pet., 341, 362.

McCool *vs.* Smith, 1 Black., 495.

The authorities supporting the above proposition are, in addition to those above cited, numberless and unvarying. They will be found collected in Endlich at the places referred to. A few extracts may be suitable here:

“An author must be supposed to be
“consistent with himself; and, therefore, if
“in one place he has expressed his mind
“clearly, it ought to be presumed that he is
“still of the same mind in another place,
“unless it clearly appears that he has
“changed it. In this respect, the work of
“the Legislature is treated in the same
“manner as that of any other author. The
“language of every enactment must be so
“construed, as far as possible, as to be con-
“sistent with every other which it does not
“in express terms modify or repeal. The
“law, therefore, will not allow the revoca-
“tion or alteration of a statute by construc-
“tion when the words may have their
“proper operation without it” (Endlich,
§ 182).

“But repeal by implication is not favored.
“It is a reasonable presumption that the
“Legislature did not intend to keep really
“contradictory enactments in the statute
“book, or to effect so important a measure
“as the repeal of a law without expressing
“an intention to do so. Such an interpre-

" tation, therefore, is not to be adopted
 " unless it be inevitable. Any reasonable
 " construction which offers an escape from
 " it is more likely to be in consonance with
 " the real intention. Hence it is a rule
 " founded in reason as well as in abundant
 " authority, that, in order to give an act not
 " covering the entire ground of an earlier
 " one, nor clearly intended as a substitute
 " for it, the effect of repealing it, the impli-
 " cation of an intention to repeal must
 " necessarily flow from the language used,
 " disclosing a repugnancy between its pro-
 " visions and those of the earlier law, so
 " positive as to be irreconcilable by any fair,
 " strict, or liberal construction of it, which
 " would, without destroying its evident
 " intent and meaning, find for it a reason-
 " able field of operation, preserving at the
 " same time the force of the earlier law,
 " and construing both together in harmony
 " with the whole course of legislation upon
 " the subject " (Endlich, § 210).

Says Mr. Justice STORY: " The question
 " then arises whether the sixty-ninth section
 " of the Act of 1799, ch. 128, has been re-
 " pealed, or whether it remains in full force.
 " That it has not been expressly or by direct
 " terms repealed is admitted; and the ques-
 " tion resolves itself into the more narrow
 " inquiry, whether it has been repealed by
 " necessary implication. We say by neces-
 " sary implication; for it is not sufficient to
 " establish that subsequent laws cover some
 " or even all of the cases provided for by it;
 " for they may be merely affirmative, or
 " accumulative, or auxiliary. But there
 " must be a positive repugnancy between

"the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

Wood *vs.* The United States, 16 Pet., 362.

- b. What justification is offered for this wholesale repeal by implication of the main feature of the scheme adopted by the act of 1870? What fact is there showing any failure or insufficiency in that scheme? What superior wisdom is there in the scheme asserted to be substituted? What hint, even the most remote, does the act of 1874 contain that that Congress intended such a substitution? And where is there the slightest repugnancy created between the amendment and the original law if we give full operation to the amending statute, as we do when it is confined to an exercise of authority by the secretary to substitute *his* arbitrary designation of the numbers of the seals to be taken on each of the islands, in place of the one then existing?
- c. The Government's interpretation is equally in conflict with that other settled rule, by which all statutory powers are to be strictly construed and are not to be extended beyond the express terms in which they are created unless there are grounds which make an *implication* necessary. What the Government claims is that the statute should be interpreted as if it contained the words from "time to time." The approved maxim is "a purely statutory authority or right must

be pursued in strict compliance with the terms of the statute."

Endlich, § 353.

- d. Against this particular implication there is another rule to the effect that an authority conferred by statute must be deemed to be exhausted by a *single exercise*, unless it appears from the nature of the act, that its repeated exercise is necessary to accomplish the legislative purpose. Nothing of the sort appears here; indeed, the contrary appears. The designation of the maximum number made by the original act was *permanent*. To change this permanent number was the intent of Congress, and such change of necessity permitted but one act. The power to subsequently further limit it in the only exigency in which it might be needful to limit it, would still remain.

State *vs.* Chase, 5 Ohio St., 520.

Oregon Steam Nav. Co. *vs.* Portland, 2 Ore., 81.

State of New York *vs.* Woodruff, 32 N. Y., 355.

People *vs.* Haines, 49 N. Y., 587, 592.

- e. There is another objection which would be quite sufficient were it the only one. The Government's construction calls upon us to substitute a scheme which at once raises doubts, in place of one entirely simple and clear. If we should conclude, from *implication*, that the secretary might exercise his authority *from time to time*, numerous questions at once arise. Is this discretion entirely arbitrary, or must it be exercised only

when the preservation of the seals requires it, and can the lessee procure in any manner a review of any exercise of it? Is it to be exercised when a lease is made for the whole period of the lease, or may it be exercised at the beginning of each year? Is it restricted to the beginning of each year, or may it be exercised at any time during the year? Can the secretary bargain it away by agreeing in a lease, or at the beginning of every year, how many seals the lessee might take during the lease or during any particular year? Can he divide or modify his power, and stipulate that a certain number may be taken during a lease or during a particular year, subject to an exercise of a further discretionary power in him to further limit the killing, if the preservation of the seals in his judgment requires it?

Is the simple and clear scheme devised by the Act of 1870, and preserved in every feature by the Revised Statutes, to be set aside in favor of another so full of doubts, and this by *implication*?

- f. All these questions must be considered under the position taken by the Government. Upon the view of the defendants none of them arise. The designation by the law, or, when a different designation has once been made by the secretary under the Act of 1874, then such designation, determines the maximum number which may be taken; and the secretary has, at all times, either when making a lease, or at the beginning of a year, or during any year, the right to exercise a discretion, which he cannot bargain

away, to further "limit the killing" if the preservation of the seals requires it.

- h. But, let another thing be considered; the act was plainly intended to have *immediately* whatever effect it was designed to have. The authority was to be exercised at once. It *was* exercised at once, and the then lessees *assented* to it. They, therefore, could not afterwards assert that it could not be put in operation as against them. Will any one believe that if, after the year 1874, the secretary had limited the first lessees to a catch of 10,000 *they* could have no reduction in the rental? And, yet, this result must surely follow under the Government's interpretation.

The learned Judge did not suppose that the view he took of the act necessarily involved this consequence. He, it must be supposed hastily, certainly very inconsistently, thought that it would be operative only on *future* leases; or rather that the new scheme would *in part* take effect as to the existing lease, and allow a new designation to be made which would be immediately operative, but that if the secretary should designate a less number than 100,000 the other part of the old scheme would still be operative, and secure to the lessees the benefit of a proportionate reduction in^e rent! (Record, p. 15.) And he says that Congress did not *intend* that it should be operative to its *full* extent against the then lessees, but only as to *future* lessees. But nothing can be plainer than that Congress intended that whatever effect the act should have, it should *immediately* have. If any exception had been intended as to the

present lessees, such exception would have been expressed.

5. Again, the departmental construction has always been in accordance with the view above maintained. The present attitude of the government is a wholly *new* assertion. This is shown in two ways:

- (a.) By the character of the advertisement for bids, and the bids submitted in 1890. It is incredible that there should have been a complete misunderstanding between the department and the bidders of the nature of right which the government intended to let.

The advertisement at the letting in 1890 (Record, p. 84) was in all substantial respects similar to that in 1870 (Record, p. 69), except that in the former there was a limitation, for the first year, to 60,000, and a statement that for subsequent years the number would be determined "in accordance with the provisions of law." The provision of law thus mentioned must of course be understood as being those contained in the statutes.

What right did the secretary *assume* to exercise when he made this limitation? Was it the *absolute right to designate* under the act of 1874, or the discretionary right to limit killing under the Revised Statutes? The Government asserts—must assert—that it was the former; for the latter was abrogated, on its view, by the act of 1874. But it was *not* the former, and it *was* the latter. The former was a right to designate the number *for each island*, and could never be exercised without such designation. What the secre-

tary did by this advertisement was to "*limit killing*," without regard to numbers on each island, and this he could do only under the scheme of the act of 1870 and the Revised Statutes, which the Government asserts had been abrogated.

Turning to the *bids*, it will be perceived, on examination, that they were obviously based on the assumption that there was a normal maximum of 100,000, and that the limitation to 60,000 for the first year was an exercise of the secretary's discretionary power. All of them are consistent with this supposal, and some *require* it.

Take the Alaska Commercial Company's bid. This was the old lessee, which, if any one, understood the meaning and purpose of the act of 1874. In its bid it offered, in addition to gross rental, \$4.50 for each seal taken, and in its statement of what this^r would yield to the Government it put the sum of \$450,000, showing clearly its reliance upon the normal maximum of 100,000 (Record, pp. 93, 94).

Take one of the bids of the *present lessee*, and its understanding is equally clear. The sum bid for each seal is \$5.11, and the statement is that this will net the Government, on the normal catch, \$511,000 (Record, p. 98).

Take another bid of the same company. It offered \$8.75 for each seal, on condition that the secretary would not exercise his *discretionary power* to limit killing after the first year (Record, pp. 103, 104).

- b. The departmental construction is further conclusively shown by *its own action under the present lease*. For each year up

to the one as to which this controversy has been started, it made a proportionate reduction of the rental based on the assumption of a fixed maximum of 100,000, except that for the first year, 1890, the reduction was applied only to the gross rental (Eighth Finding, p. 23).

6. The foregoing reasons for the adoption of the interpretation of the Act of 1874, herein maintained, are believed to be conclusive. They are, however, like most of the grounds upon which statutory interpretation rests, *inferential*. It so happens, however, that we have, in this case, from an entirely different source, a *direct* and authoritative *declaration* of the purpose intended by the act, derived from the *reports* of the *Congressional Committees*. These declare that the object of the act was simply and solely to correct the distribution between the two islands of the maximum number of 100,000, without altering the aggregate. This information was not in the possession of counsel at the trial and argument of the case in the Circuit Court.

The bill for this act was reported from the Committee on Commerce to the House by Mr. Conger, who made an oral report explaining its purpose.

When it was reported to the Senate, Mr. Chandler, of the Committee on Commerce, made a similar report of its purpose. The bill in each House was taken up and passed by unanimous consent upon these statements.

The following are the extracts from the *Congressional Record*:

“ A bill to amend the ‘ Act to Prevent the

“ ‘ Extermination of Fur-bearing animals in
 “ ‘ Alaska,’ reported March 3d, 1874, from the
 “ ‘ Committee on Commerce to the House by
 “ ‘ Mr. Conger, who explained its purpose as
 “ ‘ follows:

“ ‘ I wish to make a single remark in refer-
 “ ‘ ence to this bill. It was prepared by the
 “ ‘ Secretary of the Treasury and sent to the
 “ ‘ Committee on Commerce by the House.
 “ ‘ It provides that the secretary, in his dis-
 “ ‘ cretion, may determine the number of seals
 “ ‘ which may be killed on each of the islands
 “ ‘ of St. Paul and St. George, and the time
 “ ‘ when they may be killed. The Government
 “ ‘ receives a revenue of \$261,000 a year as
 “ ‘ a royalty for the killing of fur seals on
 “ ‘ these islands, and it is all done under the
 “ ‘ discretion of the Secretary of the Treas-
 “ ‘ ury. One hundred thousand seals are per-
 “ ‘ mitted to be killed annually. By the law
 “ ‘ it is provided that three-quarters of that
 “ ‘ number may be killed on the island of St.
 “ ‘ Paul, and the remaining one-quarter on the
 “ ‘ smaller island of St. George. In the state
 “ ‘ of knowledge of these islands it was thought
 “ ‘ that was the proper proportion. A Gov-
 “ ‘ ernment agent was sent nearly two years
 “ ‘ ago to examine the number and habits of the
 “ ‘ fur seals on each island, and that agent, Mr.
 “ ‘ W. H. Elliot, has made an exhaustive re-
 “ ‘ port on the whole subject, which has been
 “ ‘ printed. From that report it appears only
 “ ‘ about one-twentieth or one-thirtieth of the
 “ ‘ seals inhabit St. George Island. The pro-
 “ ‘ portion, therefore, allowed by the law to
 “ ‘ be taken from the smaller island is mani-
 “ ‘ festly too large. The number, too, varies
 “ ‘ on that island from year to year.

" ' The necessity for this legislation is that
 " ' there is but one steamer leaving San Fran-
 " ' cisco authorized by Government to go to
 " ' these islands. A very good steamer leaves
 " ' San Francisco in the spring, about the first
 " ' of April, and then in the fall, to bring down
 " ' the skins which have been taken. The
 " ' Secretary of the Treasury desires this ac-
 " ' tion of the House that he may send instruc-
 " ' tions to the Government agent by the
 " ' steamer leaving in April, and in order to
 " ' do that this bill must pass the House and
 " ' become a law at once.'

" ' The Bill makes no change in the law in
 " ' regard to the number of fur seals which may
 " ' be killed, but merely authorizes the Secre-
 " ' tary of the Treasury to determine and to so
 " ' instruct the agent of the government what
 " ' number may be killed respectively on each
 " ' of these islands. It also enables him to
 " ' determine the time when these fur seals
 " ' may be killed. The time is now fixed for
 " ' four months in the year. It is found it
 " ' should commence earlier, about the*middle
 " ' of May, as the fur seals arrive at that time.
 " ' It would give longer for the taking of the
 " ' fur seals, and thus prevent their being scared
 " ' away from the islands.

" ' The committee are of the opinion that
 " ' the Bill is a proper one to be passed.

" ' Bill reported in the Senate by Mr. Dennis.
 " ' Mr. Chandler explained the bill as follows:
 " ' The present law compels them to kill twenty-
 " ' five thousand seals on the island of St.
 " ' George and seventy-five thousand on the
 " ' island of St. Paul. There are one-thirtieth
 " ' as many seals on the island of St. George as
 " ' on the island of St. Paul; and it is exter-

“minating the seals on the smaller island while
 “it is leaving a large excess on the larger. It
 “was a mistake in the original bill which is
 “herein corrected.”

2. Certainly in the face of this evidence no doubt can any longer be indulged concerning the interpretation of this act, provided the act is *susceptible* of a construction in accordance with the declared purpose.

The *committees* of a legislative body are its authorized agencies for examining into the merits of proposed measures, and for putting into appropriate language the will of the body, or what they recommend as being fit to be made its will. Their reports accompanying the presentation of bills, of the purposes of such bills, are simply declarations of what the language employed means and will effect.

When a bill is reported from a committee with a statement, written or oral, from its responsible mouthpiece, and upon such statement all rules are, as in this case, immediately suspended and the measure at once passed without debate, no doubt is admissible that the body intended to do the very thing it was thus recommended to do.

3. The propriety of the resort by the Court to this means of information, when there is any doubt concerning the meaning of a statute, has been fully established.

a. In the interpretation of a statute we must place ourselves as far as possible in the same position which the legislature occupied in enacting it, and to do this we must find out

what it proposed to do, or, as Mr. Justice Bradley expressed it, learn "the point before the legislative mind." (*Tremens vs. Sellers*, 123 U. S., 276, 285.) Indeed, the final rule of interpretation is to consider the *mis-chief which the statute intended to redress*; and how can we learn this so clearly as from a direct statement by an authorized committee of the legislature?

b. It is on this ground that *preambles*, although no part of the acts to which they are prefixed are universally resorted to for light as to the meaning. Says Mr. Chief Justice Tindal, in the case of the claim of the Dukedom of Sussex (8 Lond. Jur., 795): "But if any doubt arise from the terms employed by the Legislature, it has always been held as a safe means of collecting the intention, to call in aid the ground or cause of making the statute, and to have recourse to the preamble; which according to Chief Justice Dyer, is a key to open the minds of the makers of the act and the mischiefs which they intended to redress."

c. For the same reason a *petition* for an act is held most instructive in endeavoring to learn its object; but it is evidently less authoritative than the explicit statement of a committee accompanying the report of a bill.

Furman vs. New York; 5 Sand S.C., 16.

d. This Court has frequently resorted to the precise evidence now under notice, and has, in one instance at least, made its decision

upon the strength of such evidence. In the case of *Blake vs. National Banks* (23 Wall, 307), a certain construction was insisted upon by the defendants of a statutory provision imposing taxes upon the incomes of corporations. It was based upon the *literal* interpretation of the language employed. The result of it would be that whereas Congress imposed a tax upon the incomes of individuals during the whole of the years 1870 and 1871, yet in the case of corporations there would be a hiatus from August 1 till 1870, during which no tax was imposed. The Court said:

“ It is impossible to believe that Congress
 “ intended to make this discrimination. It
 “ is entirely unreasonable, and is not in
 “ harmony with the well known views of
 “ Congress on the subject.”

It is thereupon resorted to the history of the framing and passage of the act by an appeal to the same evidence as that which we have above resorted to, the Congressional Record, and from that evidence came to the conclusion that the intent of Congress was not what it was asserted by the defendants in the case to be.

The familiar practice of many Courts in the interpretation of the revisions of statutes by Commissioners to borrow aid in interpretation from the reports of the Commissioners stating the purposes in view is based upon the same considerations.

Endlich on Stat. Int., §§ 62-69.

c. This species of evidence is quite different

from the speeches or declarations of members of the legislature in the course of debate.

These indicate their views alone, and are for manifest reasons of little or no value in ascertaining the object of the body generally.

f. That the case is one of doubt, and therefore a fit one for resorting to this source of light respecting the intention, is entirely plain. The law purports to be an amendment of the Act of 1870. That Act established a *system* of leasing, the fundamental feature of which was to make the thing leased a right to take the annual product of the seal herds of two islands for a rent to be determined by bidding. The extent of the right was limited by the Act to 75,000 from St. Paul's, and 25,000 from St. George (100,000 in all), with a discretion in the secretary to reduce the number in case the preservation of the seals required it, but with a corresponding reduction of the rent. This limitation was a double one. It limited the whole number to be taken to 100,000, which was a matter involving directly the extent of the right to be acquired by the lessees. It also *distributed* this number between the two islands, which did not affect the value of the right, and was designed to make the latter proportional to the size and capabilities of the two herds.

The amending Act did not, itself, change anything, or *require* the secretary to change anything. It *authorized* him to change the designations of the numbers to be taken respectively from the two islands, and of the months in which they were to be taken. Under the language employed, taken liter-

ally, he might, possibly, have power to designate numbers which would increase the maximum above, or reduced it below 100,000; or, only, while preserving that maximum, to change the relative numbers to be taken on each island. Which was intended? There is a doubt on the *face* of the act; for, if the first was intended, the use of the word "respectively" was needless; if the second, that word was proper and significant. One of the meanings of "respectively" is "relatively," and to designate the numbers from each island *respectively*, is to designate the *relative* numbers from each island, that is, to change the *relation* or *ratio* which the number then prescribed for each island bore to the other. When we come to apply the Act to its subject matter, it becomes difficult, indeed impossible, to believe that anything more was intended. The wider meaning would make the Act change the whole system of leasing, authorize a government officer to destroy existing rights based upon solemn contract, and introduce many doubts as to whether the authority could be exercised repeatedly, and from time to time, or once only.

On turning to the reports of the committees, every doubt is immediately dispelled. It is declared, in terms, that "the bill makes no change in the law in regard to the number of fur seals which may be killed, but merely authorizes the Secretary of the Treasury to determine, and to so instruct the agent of the government, what number may be killed *respectively* on each of these islands," thus showing the sense in which the word "respectively" was employed.

7. And all this is confirmed by what was actually *done* under the act, which also shows that the whole thing had been previously agreed to between the secretary and the lessees. The designation was immediately made of 90,000 for St. Paul and 10,000 for St. George and the lease changed accordingly the next day. (Record, pp. 134, 135).

8. And, finally, upon this whole question, of the interpretation of these successive pieces of legislation, the act of 1870, the revision of it in 1874, and the amending act of 1874, resulting in the question whether this present lease contemplates a maximum catch of 100,000, with a discretion in the secretary to further limit it on the single contingency of its being necessary for the preservation of the seals, and with a corresponding reduction of rent in case of such further limitation the *repeated action* of the Government itself plainly shows its own conviction that the interpretation of the plaintiffs in error is the true one. This is not indeed an *estoppel*, but it shows such a uniform interpretation agreed to by both parties as to make it matter of wonder that the government should now call upon any tribunal to reverse its own interpretation.

a. For the year 1890 the take was 21,000, and in the settlement with the department the gross rental was reduced on the assumption of a maximum quota allowed to the lessees of 100,000 (Eighth Finding, Record, p. 23.) Whether the claim was, or was not, advanced that the *per capita* rental should also be reduced does not appear; but the reduction actually allowed is not, for that

reason, less significant upon the quest now under notice.

- b. For the year 1891 the take was 13,482 and in the settlement both the gross and the *per capita* rental was reduced upon the assumption of a maximum quota of 100,000. (Record, p. 140).
- c. For the year 1892, that immediately preceding the year in question, the take was 7,509 and the settlement embraced a like reduction on the same assumption. (Record pp. 142, 143). See also Eighth Finding, p. 23.
- d. The treaty of April, 1892, between the U. S. and Great Britain for the arbitration held at Paris in 1893, by its terms provided for the submission of claims against Great Britain of two descriptions, *first* those of the United States for damages sustained by it in consequence of the limitation of the catch to 7,500 and those sustained by the present lessees, the North American Commercial Company.

In the statement in the *case* made up by the United States of these claims, it is assumed, and indeed stated, that a maximum quota of 100,000 is "prescribed by statute; and the amount of the claims is calculated upon that basis." (Record, pp. 78, 79, 80).

Seventh Point.—It being shown that the obligation of the Government was to allow one hundred thousand seals to be taken under the lease, unless the secretary was of opinion that the condition of the herd required a limitation of that number and made a limitation on that ground, it follows that the United States cannot maintain this action. The secretary never made any such limitation, and yet the Government would not allow the company to take the annual product.

1. The limitation actually made was in pursuance of an agreement made by the Government of the United States with a foreign nation for the sake of facilitating a negotiation with that nation. It was, so far as the defendants are concerned, entirely arbitrary. It was the mere exercise of power on the part of the United States, and was not and did not in any manner purport to be in pursuance of the provisions of the statute (9th, 10th, 11th and 12th Findings).
2. Moreover, it was no act of the Secretary of the Treasury whatever. He had no concern with it. It was the direct act of the United States Government. All he had to do with it was to communicate his order to the lessees in pursuance of this act of the Government itself.
3. It was not in any manner assented to by the lessees. True, they made no opposition to it; but all opposition would have been absolutely ineffectual. They obeyed, as they were obliged to obey, the order of the Government.

4. To hold that these lessees under a contract securing to them the whole annual product of the herd, limited only by the number of 100,000 subject to the discretionary power of the secretary, as above mentioned, could be deprived of the right thus secured to them, and so deprived of that right by the intervention of the arbitrary authority of the United States, the lessor, and yet that that very lessor could, notwithstanding, recover the whole annual rental stipulated for by the lease, is utterly inconsistent with any view of the law of contracts.

Eighth Point.—It is possible, however, that it may be thought that although the order of the Government under the *modus vivendi* forbidding the lessees to take any seals was, in form, peremptory, yet that there are some evidences that the lessees conceived themselves entitled to the skins of the 7,500 and actually received them, under the lease, and that consequently the Government is entitled to maintain this action. This depends upon what the understanding or agreement was under which the lessees received the 7,500 skins, for it must have been under some agreement.

It is submitted that according to the true construction of this transaction, they received them pursuant to an *implied* understanding *outside* of the lease, that they were to pay for them their reasonable value, after deducting the fifty cents per skin paid to the natives for their services.

1. It will be remembered that the order of the Secretary of the Treasury was, not that the lessee should take 7,500 skins only, but that

they should not take *any* skins. (Tenth Finding, p. 24.)

2. It will further be noted that the taking of this 7,500 was industriously made a taking by the Government itself under *its* agents, and not by the lessees under their agents. Both the testimony and the written orders or notices of the Government agents very clearly show this (Same Finding as above).
3. It will also be noted that by the *modus vivendi* it was expressly agreed that these seals were to be taken, not for their *skins*, but as *food* for natives (9th Finding, p. 23).
4. It seems difficult with this evidence before us, to say that these skins were in any manner taken under the lease.

Ninth Point.—If however, we were to indulge the assumption that the skins were accepted as if taken in some manner under the lease, this action may be maintained, and the further question would be one relating wholly to the amount which might be recovered by the Government.

1. It is not to be denied that there seems to have been an *expectation* both on the part of the lessees and of the treasury officers, including the secretary, that the lessees were in some manner to have the skins of these seals; nor is it to be denied that, although they were really *taken* under the direction of the Government and by its agents, and in a manner quite different from that always pursued when seals were

taken by the lessees under the lease, they were yet turned over to the lessees very much in the same manner as skins of seals regularly taken by the lessees.

2. It is submitted that the only reason why they were turned over to the lessees was that there were no other persons who could conveniently dispose of the skins, and that the disposition of the matter in respect to price, etc., was to be left for future arrangement. It may be very probable that the lessees might be willing to pay for them such sum as they would have been obliged to pay had the take been regularly and properly limited by the secretary to a quota of 7,500. Otherwise they would be obliged to pay their reasonable value, and that might be a larger sum. But this would wholly fail to establish a right in the United States Government to maintain this action.

Tenth Point.—Assuming, however, that the case is to be treated in the same manner as if these skins were received *under the lease*, and *as if* the secretary had himself made the reduction by an exercise of his discretionary power, and the lessees had arranged to receive them under the lease, it is entirely clear that the Government can recover only a reduced rental.

1. If we are correct in our construction of the statute this follows as a necessary consequence. The quota being reduced, the rental must be

reduced accordingly, and in the same proportion as 7,500 bears to 100,000. It is not possible that a *wrongful* limitation of the killing would confer upon the Government greater rights than a *rightful* limitation.

Eleventh Point.—But here the Government makes the point that even if the *rental* is reduced, the \$7.62½ to be paid for each skin is not subject to the reduction because it is not *rental*, but a *royalty*. There is no color of foundation for this proposition.

1. The statutory authority to the Secretary of the Treasury to make a lease permits him to make it for a *rental* and for that alone. Whatever stipulation he might put, the lessees under to make compensation for the right or privilege leased, it must be a stipulation for *rental* only.

2. The advertisement of the secretary to secure bids called for a bidding only of *rental*, not of royalty, or of any other sum but rental.

Of course the two dollars to be paid as a revenue tax was well understood not to be rental because it was required by law, not as rental, but to be paid, *eo nomine*, as a revenue tax.

3. When the lessees made their bids they made them in pursuance of the offer, and therefore intended their bids to be of *rental* only.

4. The amounts thus agreed to be paid both in letter and in substance correspond to the precise definition of *rental*. It is a sum agreed to be paid as a *return* for property *leased*, just as much as the gross sum which was bid.

In *amount* the *per capita* rental is the principal thing. The gross rental is but a small item in comparison. The former would amount, on a take of 60,000, to \$457,500, against \$60,000 for the latter. We cannot suppose that a form of bid was intended which would render the provision for reducing rental comparatively unimportant.

5. Being, therefore, in every sense of the word, *rental*, it is just as subject to reduction as the gross sum.

6. The various settlements which took place in respect to prior years between the lessees and the Secretary of the Treasury show that this was the understanding.

An exception to this is found in the settlement for 1890. Apparently on this occasion the lessees were not advised of their rights and did not make the claim, but when it was made it was acceded to, and the Attorney General upon being consulted by the secretary affirmed that construction of the lease in his opinion.

7. The notion that this sum should not be subject to reduction seems to have arisen from the circumstance that it was a sum to be paid for each skin taken, and that therefore the rent was less as the number was less. The notion is that the rent reduces itself, as it were, and therefore is not to be further reduced.

This, however, is an erroneous view. The rental in no manner reduces itself. The *un-reduced* rental is \$7.62½ for each skin taken.

8. It was entirely optional to the bidders either to bid the whole rental in the shape of a gross sum, or partly of a gross sum and partly of a *per capita* amount on each seal. Surely the question of the reduction of rental cannot be made to depend upon the *form* in which the bid was made. The reason for making a bid of a gross sum at all was the necessity of complying with the statute which made a bid of at least \$50,000 requisite, subject to the reduction required by the statutes.

9. The notion advanced on behalf of the Government seems to be that there is some injustice in reducing a rental made by its terms dependent upon the amount of the harvest; but a little reflection will show that there is no foundation for this view. We must not assume, for it is not true, that the lessees would make the same profit *on each seal*, whether a small or a large number were taken. *Each seal costs more as the number taken is less.*

The lessees are required at the beginning of each year *to incur substantially the same expense for their privileges under the lease, whatever may be the number of seals taken.* This expense is very large and a very considerable number of skins must be secured before the lessees can realize any profit at all; and after their profits begin, the amount of their profit depends altogether upon the number of seals taken. If the price of skins is very high their expenses may be reimbursed by a comparatively small num-

ber of skins; but if the price is low they would have to take a very large number in order to extinguish the expense. The price of these skins is a matter depending almost entirely upon fashion, which creates the demand, and the lessees in taking a lease for twenty years are obliged to contemplate the possibility, and the probability, that the demand might become very largely diminished from what it was when the lease was executed, the skins at that time, in consequence of fashion, being in great demand. It was within the easy range of probability that it might take 20,000 skins to pay the expenses to which the lessees had subjected themselves, and a large additional number to pay even the reduced rental which the lessees would be obliged to pay in addition to their expenses. It was within the range of easy possibility and even of probability, that the price of skins would fall as low as \$10, in which case, were there no reduction of that part of the rental made up of the \$7.62½ for each skin, the lessees would be subjected to a loss, no matter how many they took, *indeed the loss would be greater the more they took*. No such result could possibly have been intended. It is only when the price of skins is very high—a condition which cannot be by any means contemplated as permanent—that any foundation whatsoever appears for the suggestion that a reduction of the \$7.62½ would be an unreasonable concession to the lessees. We must put ourselves in the position in which the parties stood when the lease was made, take into view the fact that the lessees were subjecting themselves to pecuniary obligations lasting during a period of twenty years and covering every possibility in

the way of a variation in price, in order to consider this question of reasonableness, if it has anything to do with the construction of the lease itself.

Let it be supposed that 100,000 seals were taken in a year. The obligations of the lessees would be as follows:

Expenses, to comply with the obligations in the lease other than rent, say	\$100,000
Gross rental	60,000
Per capita rental	762,500
Revenue tax	200,000
	<hr/>
	\$1,122,500

It will be seen that in this case the lessees would be obliged to obtain more than \$11 for each skin before they could make anything, and yet that at the same time the United States would be making nearly a million of dollars on the transaction, and if the price of the skins should run down as low as \$8—and they might easily reach a lower price—the lessees would be subjected, provided they took 100,000 skins, which they might well do, not knowing what the price would be when the skins reached a market, to a loss of more than \$300,000.

Let it be supposed that the secretary had properly limited the number in some particular year to 50,000 skins, and that number had been taken, and the price of the skins had been \$8. In that case, upon our view of the construction of the lease in the matter of reducing the rent,

the obligations of the lessees would have been as follows:

Expenses, say	\$100,000
Gross rental	30,000
Per capita rental	381,250
Revenue tax	100,000
	<hr/>
	\$611,250

In this case there would have been a loss of over \$200,000 to the lessees, while the Government would have received over \$600,000.

Before the lessees could have made as much as \$200,000 for the year, the prices of skins must reach \$16 each, and, while they were making \$200,000 only, the Government would have been receiving, as just stated, more than \$600,000.

These considerations serve to show the hazardous nature of the undertaking and also to show that justice and reasonableness, if these considerations are taken into view, require that the reduction should be applied not only to the gross rental, but to the per capita rental.

10. But the language of the statute itself is peremptory. Whenever there is a reduction made by the secretary in the number taken, the rental must be reduced proportionately, and there is no legal supposal which can be indulged that the per capita rental is not rental just as much as the gross rental.

Twelfth Point.—If the computation is made of the amount due the Government upon the view that a reduction is to be made of the whole rental, per capita as well as gross, the amount thus due is \$23,789.50 (see Exhibits 26, 27 and 31, pp. 143, 156), the amount which was tendered by the lessees before the suit was brought.

1. This offer was made not as a waiver of any right on the part of the lessees, but by way of an adjustment to which they were willing to assent in accordance with previous settlements between them and the Government, rather than encounter a litigation.

Thirteenth Point.—In the event that the Court should be of opinion that the Government can maintain the action in respect to the 7,500 skins, either for the whole rental, or for a reduced rental, it will be necessary to determine the question respecting the counterclaim set up by the defendants and its amount.

This counterclaim was fully established.

1. The true construction of the lease as hereinbefore shown, gave the lessees the right to the whole annual product of the herd, limited only by the number of 100,000, unless the secretary, in the exercise of the discretion entrusted to him under the law, made a further restriction. That restriction he never did make. But by the arbitrary order of the Government the lessees received, and received under the lease (upon the view now indulged) 7,500.

The right to an allowance by way of dam-

ages against the Government for the breach of its obligation thus committed, is clear. The only question is as to its amount.

We have indulged the view necessary to the maintenance of the action of the Government, that the 7,500 skins were in some manner received under the lease; but there is no evidence tending in any manner to establish that the lessees ever waived, in any form, their rights to the full annual product of the herd limited as above mentioned.

2. The contrary, however, is fully and completely shown. From the first they have made a demand upon the Government for damages and that demand has never been resisted on any ground to the effect that the lessees had waived it.

Fourteenth Point.—The point was made by the Government before the Trial Court that the damages claimed were speculative, and that they could not be allowed at all. This position cannot be maintained.

1. It certainly cannot be contended that the damages were *uncertain*, in the sense that they were incapable of *ascertainment*. In their nature they were entirely susceptible of proof, and proof was fully supplied. It was fully proved that the condition of the herd was such that the defendants could have taken, but for the peremptory prohibition of the Government, at least 20,000 marketable skins. The market

price of the skins was proved, and also the sum which the taking of them would have cost. The difference would have been a clear profit, and this was what the defendants lost.

That these damages were in the nature of *profits* is no objection to a recovery for them. Lost *profits* are the damages in numerous cases of breach of contract. In many contracts, as, for instance, those to execute work for another, to lease a farm, to hire a ship, the *profit* to be made out of the transaction is the thing really purchased, and the amount of such profit is strictly the measure of the damages. In ascertaining the amount of the profit we are not, indeed, in general permitted to prove the loss of a *particular bargain*, but we can prove the *things*, or the *rights* to things, which the claimant of damages would have acquired by the performance of the contract, and the value of those things or rights. In this case the defendants would have acquired the *right* to take 20,000 seals, and the value of this right would have been the market value of the seals less the expense of marketing them. *

2. Damages must not indeed be too *remote*. The object of this rule is to avoid judgments based upon supposed results as likely not to happen as to happen. The law seeks to avoid, as far as possible, the merely *speculative*, the *uncertain*, as a ground of decision. If a passenger were wrongfully put off a railroad train in a wet night and contracted a malady which disabled him from labor for a time, he might prove as his damages the fair value of his time, but probably not the fact that some one offered him a very remunerative employment which his illness prevented him from accepting.

The specifications of uncertainty and remoteness made by the Government were that it was not certain that the defendants would really have taken 20,000 seals, or that they would, or could, have sold the skins for the amount claimed. But this is simply introducing the uncertainty and speculation which it is the object of the rule to exclude. Surely if a man has the *right* to take 20,000 skins which he can sell at a profit of \$10 each, he will exercise that right, and if such skins are at the time sold in the market at \$20 each in large quantities, it is idle to suggest that we do not know what 20,000 more would have produced.

3. The *rule* founded on the considerations above mentioned has *two* expressions; one adapted to cases of *tort*, and the other to those of contract. The first is that the damages recoverable *are such as, in the ordinary course of things, would naturally flow from the wrongful act.* The second, that they are such as *in the ordinary course of things would naturally flow from the breach, or such as appear to have been within the contemplation of the parties.*

Wood's Mayne on Damages, §52.

4. This rule is well stated and illustrated in *Masterton vs. The Mayor of Brooklyn* (7 Hill, 62), the leading authority upon this point in the Courts of Common Law in this country. This case arose out of a contract to furnish marble to build a city hall in Brooklyn. In giving the opinion of the Court Mr. Chief Justice NELSON said:

"When the books and cases speak of the
 "profits anticipated from a good bargain as
 "matters too remote and uncertain to be taken

" into account in ascertaining the true measure
 " of the damages, they usually have reference
 " to dependent and collateral engagements
 " entered into on the faith and expectation of
 " the performance of the principal contract.
 " But profits or advantages which are the direct
 " and immediate fruits of the contract entered
 " into between the parties stand upon a different footing. They are part and parcel of
 " the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement for the arrangement." In the United States *vs. Speed* (8 Wall., 84-85), this Court said: " The leading case on this subject in this country is *Masterton vs. Brooklyn*."

In a leading English case, *Hadley vs. Baxendale* (9 Exch., 34), the damages recoverable for a breach of contract were stated to be " such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the natural course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Fifteenth Point.—The objection made by the Government, and sustained by the Court below, to the allowance in favor of the defendants of the damages sustained by them in consequence of the unwarranted prohibition to take seals was that the claim for such damages had never been presented to the proper accounting officers and disallowed by them, as required by that statute. This objection ought not to prevail.

1. It would seem that the evidence of presentation and disallowance were sufficient. The claim was presented to the *head* of the Treasury Department. That officer *received* the claim. If it was his duty (and it is submitted that it was) to refer it to his proper subordinate, there is a *presumption* that the duty was discharged, and therefore that the claim was presented to the proper accounting officer. The secretary also informed the defendants that their claim was rejected. Is not this sufficient presumptive evidence of the disallowance of the claim by the proper accounting officer?

Sixteenth Point.—But it is quite unnecessary to press the foregoing point. There is another ground, wholly independent of any statutes of set-off, believed to be quite incontestable, upon which the claim of the defendants may be supported. It was matter of *defence* to the action.

1. The common law system of procedure permitted a plaintiff to have a judicial examina-

tion of his claim unembarrassed by any cross claims which the defendant might have against him. The latter had the same privilege of impleading the plaintiff, and was left to such remedy.

The circumstance, however, that the plaintiff owed the defendant a debt was certainly a good reason why the latter should refuse to pay the former a debt that he might owe him, or the balance only, if any; and, in some cases, such as the insolvency of the plaintiff, justice really required that he should be sustained in such refusal. Considerations of convenience, and of avoiding or diminishing litigation, united in recommending some method which would permit a suit instituted by one party to enforce a demand to be made the occasion for the presentation of rival claims by the defendant.

This was the origin of *statutes of set-off*, by which, to a certain extent and under certain limitations, a defendant, without disputing the justice of the plaintiffs' claims, was permitted to *satisfy* it, in whole or in part, by proving a claim of his own against the plaintiff.

Such a privilege must necessarily be so limited as not to permit a defendant to set up a claim which would call for a judicial inquiry essentially different from that which the plaintiff had invoked, or which would allow the policy of bankrupt acts to be defeated, and the statutes and the practice of set-off were accompanied with restrictions suitable to such ends.

2. But it was always quite possible that the *same facts* which gave a defendant a valid claim for an independent recovery against a plaintiff would be *equally pertinent and equally effective* to destroy, or reduce the claim which the

plaintiff had against him: in other words, that the same facts were equally susceptible of being made the ground of *attack*, or *defence*. In such cases the party seeking the benefit of such facts, while he could not employ them in *both* ways, might employ them in *either*, as he might choose; and if he chose to employ them by way of *defence* the statutory law of *set-off* had no application to the case. If he chose to employ them in the way of *attack*, he was driven to his independent action unless some statute of set-off enabled him to make his claim in that form. The modern procedure in many jurisdictions furnishes increased facilities in this direction under the head of *counter-claims* for causes of action arising out of *the same transaction* as that forming the subject of the action.

3. The *defensive* use of such matters, very commonly called *recoupment*, has been variously explained by different courts, sometimes as part of the law of *contracts*, under the head of *partial failure of consideration*; sometimes as part of the policy which forbids *circuity of action*; and sometimes on grounds of *general justice* and *equity*. It really rests upon the combined force of all these considerations.
4. In early times there was a disposition to restrict the defensive use of such matters and to require that they be made the subject of claim in another action, for the reason, as was thought, that otherwise the plaintiff might be *surprised*; but this view was plainly inconsistent with the nature of the right, and has never received the assent of the best authorities, and the universal inclination now is, and particularly

in this court, to favor such use whenever it may be sought, as being founded on the most scientific view of legal procedure, and required by the plainest considerations of justice and convenience. Says Mr. Justice Daniel, on giving the opinion of this Court in *Withers vs. Greene* (9 How., 213, 230): " But, however, the rule
 " laid down by the courts in England should be
 " understood, it has repeatedly been decided
 " by learned and able judges in our own coun-
 " try, when acting, too, not in virtue of a
 " statutory license or provision, but upon the
 " principles of justice and convenience, and with
 " a view of preventing litigation and expense,
 " that where fraud has occurred in obtaining
 " or in the performance of contracts, or where
 " there has been a failure of consideration,
 " total or partial, or a breach of warranty,
 " fraudulent or otherwise, all or any of these
 " facts may be relied on in defence by a party
 " when sued on such contracts."

These views were expressly and pointedly re-affirmed soon after in the case of *Van Buren v. Digges*; (11 How. 461) and have been still more recently considered and approved in the opinion pronounced by Mr. Justice Gray in *Dushane v. Benedict* (120 U. S. 630). The multitude of authorities upon this subject are collected and, in some measure, arranged, in *Am. & Eng. Cy.* Vol. 22, pp. 343, *et seq.*

5. The leading element which gives to such claims their *defensive* character is that they sprung out of the *same transaction* with that which formed the subject of the action, so that, in view of the several and respective relations which the parties occupied towards each other, or, in

cases of contract, the several and respective obligations which they assumed towards each other, the whole question may be stated to be: Does the defendant owe anything to the plaintiff and, if so, how much?

It is well expressed by Stevens J. in *Lufburrow v. Henderson* (30 Ga. 482). "The comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract treating it as an entirety and treating the things done and stipulated to be done on each side, as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, it sums up the grievances on each side instead of the plaintiff's side only, strikes a balance and gives the difference to the plaintiff if it is in his favor."

The same doctrine has been declared in many other cases.

In *Myers vs. Estelle* (47 Miss., 4), which was an action in *assumpsit* on promissory notes given for the price of land, the defence was set up of a breach of warranty and false and fraudulent representations inducing the purchase of the land. The Court said: "One demand is considered as reduced or liquidated by the other, and the surplus is regarded as the real cause of action. The defendant's claim is deducted from that of the plaintiff, and the latter recovers the excess only. The defendant is not allowed to recover any balance."

In this case it will be perceived that the matter set up by the defendant did not fall within

any statute of set-off, but it was yet allowed as a *defence*. This case was cited with apparent approval in *Farrar vs. Churchill* (135 U. S., 614).

Mr. Waite, in his work on Actions and Defences (Vol. 7, page 545), says in dealing with the subject of recoupment: "The doctrine is "but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipulated to be done on each side as consideration for the things done or stipulated to be done on the other. In regard to the distinction between recoupment and set-off, it is to be observed that the former is contra-distinguished from the latter in these three essential particulars: 1st, in being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; 2nd, in having no regard to whether or not such matter is liquidated or unliquidated; 3rd, that the remedy is not the subject of statutory regulation, but is controlled by the rules of the common law."

Railroad vs. Smith, 21 Wall, 261.

Van Buren vs. Diggs, 11 How., 461.

Winder vs. Baldwin, 14 How., 434.

Stillwell Mfg. Co. vs. Phelps, 130 U. S., 520.

Whitbeck vs. Skinner, 7 Hill, 53.

Lynch vs. Baldwin, 69 Ill., 210.

Keating vs. Springer, 146 Ill., 481.

Stacy vs. Kemp, 97 Mass., 166.

Carey vs. Guillow, 105 Mass., 18.

Davis vs. Bean, 114 Mass., 358,

support the same views.

6. The question, therefore, in the present case whether the matter of the refusal by the Government to allow to the defendants the full benefit of the right it had agreed by the very instrument on which the action was brought to give them, can be set up to defeat, either in whole or in part, the claim made by the Government should be promptly answered in the affirmative. It is simply a question whether the matter is not upon principles both of justice and expediency really *defensive* in its nature.

The principle is that justice does not permit a party to a transaction or a contract who has been guilty of a wrong, or a default, towards the other party to withhold that wrong or default from judicial observation and *select* some feature of the transaction or contract in which the latter is in default and claim a recovery against him. What justice requires is that the *whole transaction*, and the conduct of both parties towards each other should be taken into view at once, and a determination be had whether, upon such consideration, the plaintiff is entitled to recover anything and, if anything, how much.

7. The case is a typical illustration of the doctrine invoked. Assuming as, for the sake of the argument, we must, that the Government had wrongfully refused to give the defendants the thing the price for which it was seeking to recover, we have a case upon which by the strict technical rules of procedure, as they were once applied, it could have no recovery at all upon the contract.

It had not made performance on its part. It is permitted to maintain its action upon equi-

table principles only. If equity and justice declare that technical rules should be so far relaxed as to permit the Government to recover, under the contract, what may be fairly and justly due for the skins which the defendants really received, the same equity and justice must be applied to the whole transaction, and the defendants be declared to owe so much only, as the amount thus due exceeds the amount of which they have been deprived by the wrongful action of the Government.

The circumstance that the Government is the party against whom the recoupment is claimed, is of no consequence. There is no limit to the *defences* which may be set up against the claim of the Government. If the matter relied upon is really of the nature of a *defence*, it is as fully available as if the plaintiff were a private individual. This necessarily follows as a consequence of the doctrine established by the authorities already cited. That doctrine is to the effect that such defensive matter may always be made use of without borrowing any aid from the statutes of set-off. There have been numbers of instances in which the attempt has been made to meet the claims of a state by something in the nature of *set-off*. Such claims have never succeeded for the obvious reason that to allow them would be indirectly allowing the prosecution of a suit against the Government; but the courts, in pointing out this obstacle to set-offs in suits against the Government, where there is no statute giving permission, have been careful to observe that the case would be different if the matter alleged as the foundation of the claim were of the nature of recoupment.

Thus in *State vs. Baltimore & Ohio R. R. Co.* (34 Md., 344), the Court says: "Upon
 " the question raised by the demurrer to the
 " second plea, we concur in the ruling of the
 " Superior Court. In actions instituted by
 " the State it is well settled that no right of
 " set-off exists unless in cases where such
 " defence is expressly allowed by statute for
 " the reason that the State being sovereign is
 " not liable to be sued by an individual or a
 " corporation. * * * It is very clear that
 " the subject matter of defence alleged in the
 " plea cannot constitute a ground for *recoup-*
 " *ment*, because the alleged cross claim does
 " not arise in any manner out of the contract
 " or transaction which constitutes the cause of
 " action, but is an entirely separate and
 " distinct claim, having no connection there-
 " with."

8. The distinction between this case and those of set-off is palpable. In set-off the plaintiff is guilty of no wrong or default in connection with his claim. His claim is fully established; but is satisfied or extinguished by an independent cross-claim against the plaintiff. But in *recoupment* the plaintiff is *guilty*, and the real inquiry is whether, notwithstanding his guilt, he ought, in justice, to have a recovery, and of how much.

9. Undoubtedly, the matter thus recouped *might* be made the subject of an independent suit; but this does not destroy its *defensive* character if the defendant chooses to present it in its defensive aspect. The defendant may, if he chooses, assent to the proposal of

the plaintiff to *select* one feature of the transaction for judicial examination, and afterwards by an action in his own name, pursue the same course by selecting another.

Undoubtedly also, he must abide the consequences of his election. He can bring his claim before the Court but *once*, and if he establishes defensively a claim exceeding that of the plaintiff, he must submit to a loss of the excess.

The practice allowed in set-off of obtaining a *certificate* of the excess which would be conclusive evidence in a future action by him, stands upon statute, or judicial rule, which is not available in recoupment.

Lastly.—The judgment should be reversed and final judgment be ordered for the plaintiffs in error.

JAMES C. CARTER,
Of Counsel for Plaintiffs in Error.

APPENDIX.**CHAPTER CLXXXIX.**

An Act to Prevent the Extermination of Fur-bearing Animals in Alaska.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That it shall be unlawful to kill any fur-seal upon the islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September and October, in each year; and it shall be unlawful to kill such seals at any time by the use of fire-arms, or use other means tending to drive the seals away from said islands: PROVIDED, That the natives of said islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use, which killing shall be limited and controlled by such regulations as shall be prescribed by the Secretary of the Treasury.

Sec. 2. AND BE IT FURTHER ENACTED, That it shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to said islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and any person who shall violate either of the provisions of this or the first section of this act shall be punished, on conviction thereof, for each offence by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment not exceeding six months, or by such

fine and imprisonment both, at the discretion of the court having jurisdiction and taking cognizance of the offence; and all vessels, their tackle, apparel, and furniture, whose crew shall be found engaged in the violation of any of the provisions of this act shall be forfeited to the United States.

Sec. 3. AND BE IT FURTHER ENACTED, That for the period of twenty years from and after the passage of this act the number of fur-seals which may be killed for their skins upon the island of Saint Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur-seals which may be killed for their skins upon the island of Saint George is hereby limited and restricted to twenty-five thousand per annum: PROVIDED, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act.

Sec. 4. AND BE IT FURTHER ENACTED, That immediately after the passage of this act the Secretary of the Treasury shall lease, for the rental mentioned in section six of this act, to proper and responsible parties, to the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the first day of May, eighteen hundred and seventy, the right to engage in the business of taking fur seals on the islands of Saint Paul and Saint George, and to send a vessel or vessels to said islands for the skins of such seals, giving to

the lessee or lessees of said islands a lease, duly executed, in duplicate, not transferable, and taking from the lessee or lessees of said islands a bond, with sufficient sureties, in a sum not less than five hundred thousand dollars, conditional for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject matter of taking fur-seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith. And in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance, and education of the natives thereof. The said lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue officer for the time being who may be in charge at the said islands as the authority of the party for landing and taking skins.

Sec. 5. AND BE IT FURTHER ENACTED, That at the expiration of said term of twenty years, or on surrender or forfeiture of any lease, other leases may be made in manner as aforesaid, for other terms of twenty years; but no persons other than American citizens shall be permitted, by lease or otherwise, to occupy said islands, or either of them, for the purpose of taking the skins of fur-seals therefrom, nor shall any foreign vessel be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited if the same be held or operated for the use, benefit, or advantage, directly or indirectly, of any person or persons other than American citizens. Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give, or dispose of any distilled spirits or

spirituous liquors on either of said islands to any of the natives thereof, such person not being a physician and furnishing the same for use as medicine; and any person who shall kill any fur-seal on either of said islands, or in waters adjacent thereto, without authority of the lessees thereof, and any person who shall molest, disturb, or interfere with said lessees, or either of them, or their agents or employees in the lawful prosecution of their business, under the provisions of this act, shall be deemed guilty of a misdemeanor, and shall for each offence, on conviction thereof, be punished in the same way and by like penalties as prescribed in the second section of this act; and all vessels, their tackle, apparel, appurtenances, and cargo, whose crews shall be found engaged in any violation of either of the provisions of this section, shall be forfeited to the United States; and if any person or company, under any lease herein authorized, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then said person or company shall forfeit the value of the same. And it shall be the duty of any revenue officer, officially acting as such on either of said islands, to seize and destroy any distilled spirits or spirituous liquors found thereon: PROVIDED, That such officer shall make detailed report of his doings to the collector of the port.

Sec. 6. AND BE IT FURTHER ENACTED, That the annual rental to be reserved by said lease shall not be less than fifty thousand dollars per annum, to be secured by deposit of United States bonds to that amount, and in addition thereto a revenue tax or duty

of two dollars is hereby laid upon each fur-seal skin taken and shipped from said islands, during the continuance of such lease, to be paid into the treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same, for the comfort, maintenance, education, and protection of the natives of said islands, and also for carrying into full effect all the provisions of this act:

PROVIDED FURTHER, That the Secretary of the Treasury may terminate any lease given to any person, company, or corporation on full and satisfactory proof of the violation of any of the provisions of this act or the rules and regulations established by him: PROVIDED FURTHER, That the Secretary of the Treasury is hereby authorized to deliver to the owners the fur-seal skins now stored on the islands, on the payment of one dollar for each of said skins taken and shipped away by said owners.

Sec. 7. AND BE IT FURTHER ENACTED, That the provisions of the seventh and eighth sections of "An Act to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia to establish a collection district therein, and for other purposes," approved July twenty-seven, eighteen hundred and sixty-eight, shall be deemed to apply to this act; and all prosecutions for offences committed against the provisions of this act, and all other proceedings had because of the violations of the provisions of this act, and which are authorized by said act above mentioned, shall be in accordance with the provisions thereof; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 8. AND BE IT FURTHER ENACTED, That the Congress may at any time hereafter alter, amend, or repeal this act.

Approved, July 1, 1870.

CHAPTER THREE.

Provisions Relating to the Unorganized Territory of Alaska.

SEC.

1954 Customs, &c., laws extended to Alaska.

1955 Importation of fire-arms and distilled spirits may be prohibited.

1956 Killing of fur-bearing animals prohibited.

1957 What courts to have jurisdiction of offences.

1958 Remission of fines, &c.

1959 Saint Paul and Saint George islands declared special reservations.

1960 Killing of seal upon them prohibited except in certain months.

1961 Killing of certain seal prohibited. *

1962 Limit to number of seals to be killed.

1963 Right to take seal may be leased.

1964 Bond.

1965 Who may lease.

1966 Covenants in lease.

1967 Penalty.

1968 Penalty upon lessees.

1969 Tax upon seal skins.

1970 Lease may be terminated.

1971 Lessees to furnish copies to masters of their vessels.

1972 Certain sections may be altered.

1973 Agents and assistants to manage seal fisheries.

1974 Their pay, &c.

1975 Not to be interested in right to take seals.

1976 Agents may administer certain oaths and take testimony.

Sec. 1954. The laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March, anno Domini eighteen hundred and sixty-seven, so far as the same may be applicable thereto.

Sec. 1955. The President shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska. The exportation of the same from any other port or place in the United States, when destined to any port or place in that Territory, and all such arms, ammunition and distilled spirits exported or attempted to be exported from any port or place in the United States and destined for such Territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition and distilled spirits landed or attempted to be landed or used at any port or place in the Territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds four hundred dollars the vessel upon which the same is found, or from which they have been landed, together with her tackle, apparel and furniture and cargo, shall be forfeited; and any person willfully violating such regulations shall be fined not more than five hundred dollars, or imprisoned not more than six months. Bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board fire-arms, ammunition or distilled spirits, when such vessel is destined

to any place in the Territory, or if not so destined, when there is reasonable ground of suspicion that such articles are intended to be landed therein in violation of the law; and similar bonds may also be required on the landing of any such articles in the Territory from the person to whom the same may be consigned.

Sec. 1956. No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof, and every person guilty thereof, shall, for each offense, be fined not less than two hundred nor more than one thousand dollars, or imprisoned not more than six months, or both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited; but the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable, or other fur-bearing animal, except fur-seals, under such regulation as he may prescribe; and it shall be the duty of the secretary to prevent the killing of any fur-seal and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.

Sec. 1957. Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within the limits of the same, shall be prosecuted in any district court of the United States in California or Oregon, or in the district courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties, or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one

of such courts; and such courts shall have original jurisdiction, and may take cognizance of all cases arising under this act and the several laws hereby extended over the Territory, and shall proceed therein in the same manner and with the like effect as if such cases had arisen within the district or Territory where the proceedings are brought.

Sec. 1958. In all cases of fine, penalty, or forfeiture, embraced in the act approved March 3, 1797, ch. 13, or mentioned in any act in addition to or amendatory of such act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized, if in his opinion, the fine, penalty, or forfeiture was incurred without willful negligence or intention of fraud, to ascertain the facts in such manner and under such regulations as he may deem proper without regard to the provisions of the act above referred to, and upon the facts so to be ascertained, he may exercise all the power of remission conferred upon him by that act, as fully as he might have done had such facts been ascertained under and according to the provisions of that act.

Sec. 1959. The islands of Saint Paul and Saint George, in Alaska, are declared a special reservation for Government purposes; and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury; and any person found on either of those islands contrary to the provisions hereof shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect.

Sec. 1960. It shall be unlawful to kill any fur seal upon the Islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September and October in

each year; and it shall be unlawful to kill such sea at any time by the use of fire-arms, or by other means tending to drive the seals away from those islands; but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury.

Sec. 1961. It shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and it shall also be unlawful to kill any seal in the waters adjacent to the Islands of Saint Paul and Saint George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offense by a fine of not less than two hundred dollars, nor more than one thousand dollars, or by imprisonment not more than six months, or by both such fine and imprisonment; and all vessels, their tackle, apparel and furniture, whose crews are found engaged in the violation of either this or the preceding section shall be forfeited to the United States.

Sec. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals, which may be killed for their skins upon the Island of Saint Paul, is limited to seventy-five thousand per annum; and the number of fur seals, which may be killed for their skins upon the Island of Saint George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for

the preservation of such seals, with such proportionate reduction of the rents reserved to the Government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

Sec. 1963. When the lease heretofore made by the Secretary of the Treasury to "The Alaska Commercial Company" of the right to engage in taking fur seals on the Islands of Saint Paul and Saint George, pursuant to the Act of July 1, 1870, Chapter 189, or when any future similar lease expires, or is surrendered, forfeited or terminated, the secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seal for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of United States bonds to that amount; and every such lease shall be duly executed in duplicate, and shall not be transferable.

Sec. 1964. The Secretary of the Treasury shall take from the lessees of such islands in all cases a bond, with securities, in a sum not less than five hundred thousand dollars, conditioned for the faithful observance of all the laws and requirements of Congress, and the regulations of the Secretary of the Treasury, touching the taking of fur seals and the disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith.

Sec. 1965. No persons other than American citizens shall be permitted, by lease or otherwise, to occupy the Islands of Saint Paul and Saint George, or either of them, for the purpose of taking the skins of fur seals therefrom, nor shall any foreign vessels be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited, if the same be held or operated for the use, benefit or advantage, directly or indirectly, of any persons other than American citizens.

Sec. 1966. Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give or dispose of any distilled spirits or spirituous liquors on either of those islands to any of the natives thereof, such person not being a physician and furnishing the same for use as medicine; and every revenue officer, officially acting as such on either of the islands, shall seize and destroy any distilled or spirituous liquors found thereon; but such officer shall make detailed reports of his doings in that matter to the collector of the port.

Sec. 1967. Every person who kills any fur-seal on either of those islands, or in the waters adjacent thereto, without authority of the lessees thereof, and every person who molests, disturbs, or interferes with the lessees or either of them, or their agents or employes, in the lawful prosecution of their business, under the provisions of this chapter, shall for each offence be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty-eight, inclusive, shall be forfeited to the United States.

Sec. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

Sec. 1969. In addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur-seal skin taken and shipped from the islands of Saint Paul and Saint George, during the continuance of any lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is empowered to make all needful regulations for the collection and payment of the same, and to secure the comfort, maintenance, education and protection of the natives of those islands, and also to carry into full effect all the provisions of this chapter except as otherwise prescribed.

Sec. 1970. The Secretary of the Treasury may terminate any lease given to any person, company or corporation, on full and satisfactory proof of the violation of any of the provisions of this chapter or the regulations established by him.

Sec. 1971. The lessees shall furnish to the several masters of vessels employed by them certified copies of the lease held by them respectively, which shall be presented to the Government revenue-officer for the time being who may be in charge at the islands as the authority of the party for landing and taking skins.

Sec. 1972. Congress may at any time hereafter alter, amend, or repeal sections from nineteen hundred and sixty to nineteen hundred and seventy-one, both inclusive, of this chapter.

Sec. 1973. The Secretary of the Treasury is authorized to appoint one agent and three assistant agents, who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury.

Sec. 1974. The agent shall receive the sum of ten dollars each day, one assistant agent the sum of eight dollars each day, and two assistant agents the sum of six dollars each day while so employed; and they shall also be allowed their necessary traveling expenses in going to and returning from Alaska, for which expenses vouchers shall be presented to the proper accounting officers of the Treasury, and such expenses shall not exceed in the aggregate six hundred dollars each in any one year.

Sec. 1975. Such agents shall never be interested, directly or indirectly, in any lease of the right to take seals, nor in any proceeds or profits thereof, either as owner, agent, partner, or otherwise.

Sec. 1976. Such agents are empowered to administer oaths in all cases relating to the service of the United States, and to take testimony in Alaska for the use of the Government in any matter concerning the public revenues.

CHAPTER 64.

AN ACT to amend the act entitled "An Act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN CONGRESS ASSEMBLED, That the act entitled "An Act to prevent the extermination of fur-bearing animals in Alaska," approved July first, eighteen hundred and seventy, is hereby amended so as to authorize the Secretary of the Treasury, and he is hereby authorized, to designate the months in which fur-seals may be taken for their skins on the islands of Saint Paul and Saint George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively.

Approved March 24, 1874.